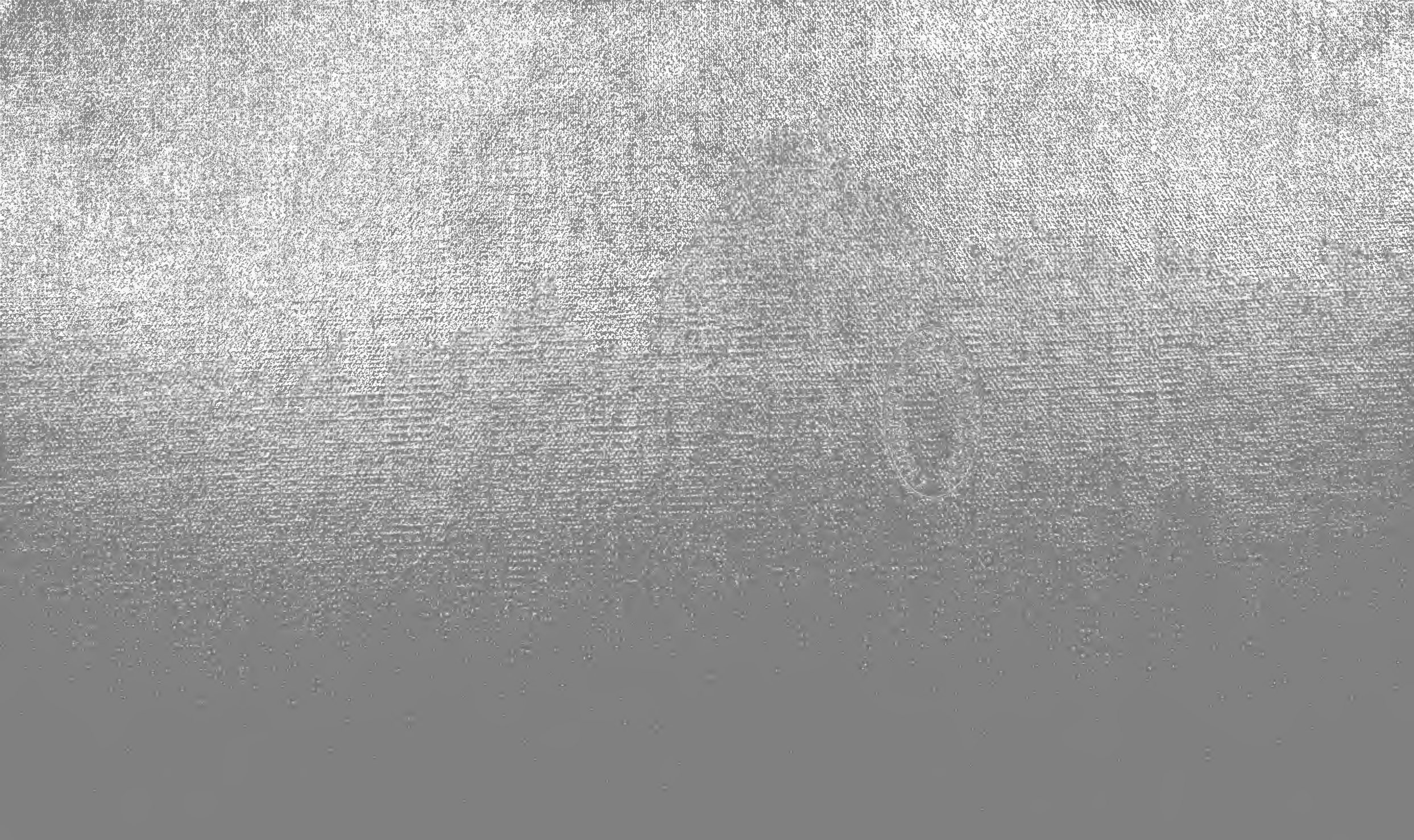


74 I.A. 85

No. 71-160

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1972.

PEOPLE OF THE STATE OF ILLINOIS, Ex rel, EDWARD JACOBSEN, No. 68856, Petitioner-Appellant, vs. WARDEN JOHN J. TWOMEY, Joliet Illinois State Prison, Respondent-Appellee.	)	Appeal from the Circuit Court of Will County.

PER CURIAM

Abstract

This cause is before us on motion to withdraw filed by Bruce Stratton, District Defender of Illinois Defender Project, who was appointed as counsel for Edward Jacobsen in the above cause. It appears from such motion that petitioner filed a pro se petition for Writ of Habeas Corpus which was dismissed for failure to allege facts entitling defendant to relief by the Circuit Court of Will County. Counsel on appeal asserts that after careful examination of the record in the case, counsel has concluded that an appeal could not possibly be successful and would be wholly frivolous in this cause. Accordingly, we have examined the record in this cause, as well as the documents filed by counsel for appellant.

It appears that the defendant-appellant Edward Jacobsen filed his pro se petition for Writ of Habeas Corpus which petition was dismissed

on May 12, 1971, for failure to state any allegations upon which relief could be granted. The procedure was under the Habeas Corpus Act (1969 Illinois Revised Statutes, Ch. 65 §22). Defendant in his petition indicated that he was in custody pursuant to the process of the court resulting from a conviction of Aggravated Kidnapping in Cook County.

The only allegation made by defendant was that his custody was "unlawful" based on the failure of the foreman of the Grand Jury to sign the indictment in accordance with Section 111-3 of Chapter 38 of Illinois Revised Statutes. Since the office of Habeas Corpus was to secure release of a prisoner detained by order of a court which is absolutely void by reason of lack of jursidiction or of the person or subject matter or where something has happened since incarceration which would entitle defendant to his release (PEOPLE EX REL LEWIS v. FRYE, 42 Ill. 2d 311), the petition filed by defendant-appellant was inadequate to justify action under the Habeas Corpus Act. Habeas Corpus does not lie to raise errors of a non-jurisdictional nature (PEOPLE EX REL TOTTEN v. FRYE, 39 Ill. 2d 549). As indicated by the Supreme Court of this State, dismissal of a pro se petition for Habeas Corpus was proper where the petition failed to suggest anything which would affect the court's jurisdiction over defendant-appellant or contain any suggestion of subsequent events entitling defendant-appellant to release (PEOPLE EX REL KALEC v. PATE, 38 Ill. 2d 350).

On the specific issue raised by defendant-appellant, the Illinois Supreme Court in PEOPLE EX REL MERRILL v. HAZARD, 361 Ill. 60, 63, 196 N.E. 827, had occasion to consider the validity of an indictment which did not bear the signature of the foreman. The court indicated that the signature of the foreman is required only as a matter of direction

Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

http://www.archive.org/details/illinoisappellat34illi

to the clerk and for information of the court and that its presence or absence does not materially affect the substantial right of defendant, since it neither assures him nor prevents him from having a fair trial.

Defendant was properly indicted by the Grand Jury and the failure to have the foreman sign the indictments did not invalidate the indictments so as to deprive the court of jurisdiction to enter judgment. In view of the fact that defendant's petition did not allege anything which would warrant the court's issuance of the Writ of Habeas Corpus, a dismissal of such petition was proper.

Upon complete examination of the record, therefore, we find that the order of the Circuit Court of Will County should be affirmed and that there has been adequate compliance with ANDERS v. CALIFORNIA, 386 U.S. 738. The judgment of the Circuit Court of Will County is, therefore, affirmed.

We have previously entered an order in this cause authorizing withdrawal of counsel pursuant to the motion to withdraw.

Affirmed.

4 I.A. 89

No. 71-130

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1972.

ABST.

RUTH E. KELLER, EDWARD E. KELLER, SARA J. TANCREDI and MARY ELLEN GRABER, Plaintiffs-Appellants, vs. EDWIN F. KELLER, EDWIN F. KELLER, JR., MARCELLA KELLER and JOAN KELLER, Defendants-Appellees.	Appeal from the Circuit Court for the 14th Judicial Circuit, General Division, Henry County. Honorable Dan H. McNeal, Presiding Judge.

ALLOY, J.

Abstract

The present action was instituted by Ruth E. Keller and Edward E. Keller, Sara J. Tancredi and Mary Ellen Graber, her three adult children, for dissolution of a partnership, appointment of receiver, an accounting, and division of proceeds. During the trial before the court, defendants tendered and paid to the Clerk of the Court $15,000 as the "agreed value" of the interest of the deceased partner, Aloysius D. Keller. The trial court ordered plaintiffs to accept the tender of the sum plus costs, and also to convey all their interest in the partnership as successors of the deceased partner to the defendants who made the tender. Since the facts in this case are significant, it is necessary that we detail the evidence for the purpose of understanding the disposition of this cause.

The record in this case discloses that in 1919, Aloysius Keller, on an original investment of approximately $1,800 began a business as a

battery shop in Kewanee, Illinois, which was thereafter expanded into an electrical appliance business. During 1919 or 1920, Aloysius Keller was joined in the business by his brother Edwin F. Keller, and by oral agreement, the two men became equal partners. After not more than a year, Aloysius left Kewanee to take an automobile dealership in another city. He thereafter moved to California. Aloysius Keller did not at any time thereafter perform any services in the partnership business. In the meantime, Edwin continued to operate the business, and in each year, after paying himself a salary, would distribute half of the net profits to Aloysius. The procedure which was followed is indicated by a letter which Edwin wrote to his brother in 1954 as follows: "Enclosed you will find the Income Tax Return Form and a check for $6,252.32, your share in the profit. My salary for 1953 was $5,200.00, and the remainder of the profit was divided equally between you and I."

While the exact date is not found in the record, it appears that a new partnership was formed by oral agreement in 1961, wherein Aloysius had a 50% share; Edwin a 30% share; and Edwin F. Keller, Jr. and Marcella Keller, children of Edwin, each had a 10% share. On June 14, 1961, the four partners entered into a "buy and sell" agreement, the salient provisions of which were substantially as follows: (1) That upon the death of a partner the surviving partners would purchase, and the decedent's estate would sell, the share of the deceased partner; (2) that the net value of the partnership for purposes of the agreement was to be regarded as the cost of inventory on hand and the fair cash value of tools and equipment, both to be determined by appraisal, plus cash on hand; (3) that the personal

representative of the deceased partner was the only representative of the heirs and legatees of the deceased partner; and (4) that "On the failure of the surviving partners to settle in the manner required within the period of sixty (60) days from the decedent's death, the decedent's estate may rescind this agreement and re-establish the situation that would have existed had it never been made."

On March 13, 1962, a supplement to the agreement was executed which recited that Edwin had assigned and transferred his interest, and that the partners bound by the agreement and their shares were: Aloysius - 50%; Edwin, Jr. - 20%; Marcella - 20%; and Joan Keller, another daughter of Edwin, - 10%. Prior to the date of the supplement, on March 9, 1962, Edwin had written to Aloysius stating: "I may turn my part of the partnership over to Ed, Marcella and Joan and see if they can make it pay out * * * ." Again, on March 13, 1962, he sent the supplement to Aloysius for signature and wrote: "I am enclosing a supplemental agreement form for your signature. Please sign and send them back to me. Hope this meets with your approval. I will still manage the business, but in order to receive my social security I must transfer my interest in the business over to someone else." Along the same lines, Edwin wrote a letter to the wife of Aloysius after the latter's death stating: "Al's share of the business was turned over to you in 1957. On June 14, 1961, it was turned back in Al's name", and we gather from Edwin's testimony at the trial that the 1957 transfer referred to had also been prompted by social security considerations.

It appears without question that from the date of the buy and sell agreement the four Kewanee Kellers devoted 100% of their time to the

business, a fact of which Aloysius and his wife were aware; that Edwin, Jr., Marcella and Joan were paid modest salaries in each year, the amount being dependent upon profits; and that Edwin was, in some of the years between 1962 and 1970, paid wages, the amount depending upon business and his social security status.

Aloysius died testate and a resident of California on January 9, 1963. By his will, which was probated in California with the decedent's son, Edward E. Keller, acting as executor, Aloysius gave his wife, the plaintiff Ruth E. Keller, a life estate in his property with the remainder to three of his children, the plaintiffs Edward E. Keller, Sara J. Tancredi and Mary Ellen Graber. There was no ancillary administration in Illinois, and neither does it appear that the executor ever rescinded or sought to carry into effect the buy and sell agreement of June 14, 1961, as supplemented.

Edwin testified in substance that he asked Ruth at the time of the funeral if she wished to discuss the business, but that she declined to do so because she was ill and understandably upset. What occurred after that must be reconstructed from various exhibits in the record, the first of which is a letter written by Edwin to Ruth on January 31, 1963, where he first stated that he had consulted an attorney and then continued:

> "He is the attorney that made out the agreement (you have a copy) between Al and I.
>
> He states that we can avoid probate in this state (Ill.) by making some type of an agreement between you and I on settlement of the partnership.
>
> As yet we have not completed the inventory or made up the returns for 1962, but I think a cash settlement of about $25,000.00 would be about right. Note could be made out in this amount if O.K. with you, or notes and some cash.

* * * *

[The attorney] also stated that you would be exempt $20,000.00 Illinois Inheritance Tax."

From a further exhibit, later set forth, it would appear that Ruth, who testified that she had suffered from a mental illness for about three years after her husband's death, did not make an immediate response to this letter.

On March 21, 1963, Edwin wrote to Ruth again, stating: "Enclosed you will find a copy of our partnership return of income, form 1065, and a check in the amount of $2,781.94 your share of the profit. * * * As far as the books go, half of the business was changed over to your name." It appears that in each year through 1970, Ruth was sent a copy of the partnership return, together with a check for a 50% share of the net profits, and the amounts paid to her were designated in the returns as a partner's share of income. The returns also disclosed that the working partners were being paid salaries.

In a letter of March 30, 1968, wherein a copy of the 1967 partnership return and a check for $2,741.43 were sent to Ruth, Edwin also wrote: "Besides this check we can offer you $12,000.00 for your share of the business. Let us know your decision and we can have the papers drawn up." So far as the record is concerned, nothing further happened until May 9, 1969, when Ruth wrote to Edwin as follows:

"About settling the partnership - I am anxious to have it settled as soon as possible. I engaged a lawyer over a year ago to draw up a trust for me and he was in the middle of it and had made some suggestions. Then he was appointed to be a judge so had to give up his private practice and I had to hunt a new lawyer. After a long delay I finally got a new attorney and have had two conferences with him - one last week with Eddie present too.

It is his opinion that I should sell any interest in the Ill. business property as soon as possible. This would avoid the necessity of ancillary probate administration in Illinois. He said he would be pleased to handle negotiations for me either personally or through an Illinois correspondent. After examining the partnership returns and other papers in regard to the business he is convinced that my share should be worth at least $20,000 but in the interest of expediency I should settle for $15,000. Eddie also agrees with that figure. We both remember Al speaking of your putting money away money [sic] (bonds I believe) in case the time should come when you would want to pay him off.

I hope you do not think I am too bold. I am just trying to think it through as Al would want me to and I really do not believe that the figure is too high.

In your letter of Jan. 21, 1963 you said 'I think a cash settlement of about $25,000 would be about right. Notes could be made out in this amount if O.K. with you, or note and some cash.'

I realize that you have put in many hard years in managing the business and that Al was a non-working partner. I think that over the years, with many ups and downs, you have averaged good returns for yourself. If you have felt any unfairness in this regard I'm sure that neither Al nor I were aware of it.

* * * *

Think it over, Ed, and if you come up with any decision please let me know."

In response to the foregoing letter, Edwin wrote to Ruth on May 21, 1969, as follows:

"I received your letter regarding the sale of your 50% share in the business. Thanks for the prompt reply to my phone call.

I will accept your offer of $15,000.00 for your one half interest in the partnership. You should have the necessary agreement drawn up stating that you will sell your 50% share in the Keller's Appliance Store partnership for $15,000.00 including everything, -stock, accounts receivable, cash on hand, etc.

Upon receiving this signed statement I will mail you a check for the full amount, or partial payment and a note for the balance, however you want it. If you plan a summer visit in this area, we can sign the papers while your here. * * * "

Nothing appears to have been done by Ruth to implement the acceptance of her offer and on October 7, 1969, Edwin's attorney wrote to her for information which would permit him to draft a bill of sale. Briefly, he pointed out that the buy and sell agreement signed by Aloysius on June 14, 1961, required payment to be made to the latter's estate, and made inquiries as to whether there had been a will, whether the estate had been administered, and as to the names of heirs and beneficiaries. On November 18, 1969, Ruth responded that the partnership was in her name at the time of her husband's death, whereupon Edwin's attorney wrote back, again referring to the purchase and sell agreement which showed Aloysius to be owner of the interest, and asking that Ruth send him a copy of the instrument by which the interest of her husband had been assigned to her. What response this request produced does not appear. However, on March 27, 1970, the attorney wrote to Ruth as follows:

> "We have prepared an assignment with copy that we are enclosing herewith for your signature and the signature of your three children, Edward E. Keller, Sara J. Tancredi and Mary Ellen Graber. According to the will it appears that you and the three children are the owners of Aloysius D. Keller's interest in Keller's Appliance Store. Would you please have the original assignment signed by all parties and mail the same back to our office. After we receive the assignment properly signed, Mr. Edwin Keller will send to you a check in the amount of $15,000 payable to you and your three children. We believe this is the proper manner to conclude this partnership."

Ruth did not reply until July 27, 1970, when she wrote:

> "Regarding your letter of March 27, 1970 it has been our position that Aloysius D. Keller's interest in Keller's Appliance Store had been transferred to my name before his death. This was confirmed at that time by telephone conversations with Mr. Edwin Keller. We do not find any

document showing this transfer. Therefore, this property was not included in the estate of A. D. Keller when the will was probated.

To be consistent, please have the assignment which you prepared changed to show me, Ruth E. Keller, the present owner of the interest of Keller's Appliance which is to be transferred.

I am sorry to have this matter drag for such a long time. We hope to hear from you soon."

Testimony in the record reveals that Ruth visited in Kewanee during September, 1970, and that the settlement was discussed, but sheds no light on the substance of such discussion. We infer, however, that she may have then started demanding something in excess of $15,000.00, for she wrote to Edwin on October 13, 1970:

"I have consulted my family and secured outside advice which convinced me that any sale of my share must be based on the terms of the buy-sell agreement. This was entered into by you and Al for the purpose of caring for the present situation. Al and you had a reason for making this agreement and I feel sure that he would want me to fulfill it because it protects both partners and families.

The figure mentioned in my previous letter is considered a fair value of my one-half interest in the net value of the partnership as shown in the 1969 and prior income tax reports.

If the figure mentioned does not meet with your approval I suggest a settlement based on the buy-sell agreement which provides for the appraisal of all inventory at cost, cash and other assets, and a fair cash market value of all other equipment and other personal property belonging to the partnership.

In event of appraisal an audit of the past 7 years should be made to prove correctness of the accounts and the division of profits to date.

I do not see how anything can be gained by further discussion nor another visit to Kewanee if you continue to disregard the buy-sell agreement."

So far as the record shows, this is where matters stood when on March 22, 1971, Ruth and the three children named as remaindermen in the will of Aloysius started this proceeding against Edwin, Edwin, Jr.,

Marcella and Joan Keller. By the complaint, as amended, it was alleged that Ruth had invested $44,000.00 worth of capital in 1962 and that she became a partner with a 50% interest in the business by oral agreement, and prayed for a dissolution of the partnership, an accounting and a distribution of the proceeds. Defendants denied these allegations and, by a counterclaim filed subsequent to the original complaint, alleged that Ruth had been appointed executor of her husband's will and that the buy and sell agreement had not been complied with due to her neglect and delay. An amended complaint was filed. Defendants, as part of the answer thereto, alleged affirmatively that Ruth, by her letter of May 9, 1969, offered to compromise and settle the undetermined and unliquidated interest claimed by her family for the sum of $15,000.00; and that such offer was accepted by Edwin's letter of May 21, 1969. At the beginning of trial on June 21, 1971, defendants filed a motion, subsequently granted, for leave to file a tender and deposit of $15,000.00 and costs of $108.40.

At the conclusion of plaintiffs' evidence, the trial court, on motion of defendants, entered an order which found that plaintiffs were not entitled to an accounting; that plaintiffs had made an offer to settle and compromise their interest in the business for $15,000.00; that such offer had been accepted by defendants and that the amount tendered and deposited with the court "pays for the sum that plaintiffs agreed to take for their interest and also pays for the interest of Ruth E. Keller and the remaining plaintiffs." Thereafter, it was ordered by the court that plaintiffs transfer to defendants all the interest formerly owned by Aloysius for the sum of $15,000.00 and court costs as tendered by

defendants, and that if plaintiffs failed and refused to transfer, then any judge of the court should make such transfer.

Plaintiffs have appealed contending first that Ruth became a partner in 1962 and continued in that relation until this proceeding was commenced, and that the trial court therefore erred in denying her an accounting for the years 1962 through 1970. We think it clear, however, that there was neither an agreement nor an intention from which it could be said that Ruth became a partner prior to the death of her husband on January 9, 1963. The March 13, 1962 supplement to the buy and sell agreement establishes clearly that the partners on such date were Aloysius, Edwin, Jr., Marcella and Joan, and there is a lack of positive proof that there was any change in the membership prior to the death of Aloysius.

Rather, we are asked to imply the formation of a new partnership from the circumstance that the 1962 income tax return designated Ruth as a partner and reflected that partnership income in the amount of $2,781.94 had been distributed to her. In our view, this single circumstance does not approximate the clear and satisfactory proof required to establish the existence of a partnership in an action between purported partners (PATEK v. PATEK, 263 Ill. App. 487, 492). Particularly is this so since there was testimony that Aloysius, on the occasion of the execution of the supplemental agreement, had directed that 1962 income be paid to Ruth for tax reasons (c. f. BRAMSON v. BRAMSON, 4 Ill. App. 2d 249, 259). The same 1962 return showed Aloysius to be the owner of 50% of the firm's capital. The actual distribution was made at a time when, by the terms of the decedent's will, Ruth had a life interest in his property. Moreover,

mere participation in profits does not of itself create a partnership (RIZZO v. RIZZO, 3 Ill. 2d 291, 300), and this principle is substantially embodied in Section 7(4)(c) of the Uniform Partnership Act wherein it is provided that an inference of a partnership does not arise when profits are received in payment as an annuity to a widow or representative of a deceased partner (1961 Illinois Revised Statutes, Ch. 106-1/2, par. 7(4)(c)).

Whether or not Ruth became a partner subsequent to the death of her husband is, under the circumstances shown in the record, a more involved question. We believe that she did become a partner but only after the death of her husband. Ordinarily, under general rules, the death of a partner dissolves a partnership (HARMON v. MARTIN, 395 Ill. 575; 1961 Illinois Revised Statutes, Ch. 106-1/2, par. 31(4)). Title to the partnership property vests in the surviving partner with a right of possession for partnership purposes only (IN RE McCORMACK'S ESTATE, 286 Ill. App. 90; 1961 Illinois Revised Statutes, Ch. 106-1/2, par. 25(2)(d)). The survivor cannot convert the business to his own use, but has a duty to wind up the affairs of the partnership (29 I. L. P., Partnership, §213, p. 398). As stated by the court in IN RE ESTATE OF STRECK, 35 Ill. App. 2d 473, 482, however, the rules ordinarily applicable on the death of a partner do not mean "that partners are powerless to provide by contract for the continuation of the business and the purchase of the decedent's share."

In the present case the buy and sell agreement, as supplemented, makes it clear that the partners surviving at the death of Aloysius, viz., Edwin, Jr., Marcella and Joan, were to continue the business, leaving little room for a claim that there was an agreement or intention that Ruth was to become a partner. This buy and sell agreement, however, was never carried out, but seems to have been abandoned with the mutual consent of both sides.

In discussing applicable principles relating to a partnership, the Supreme Court of this State in RIZZO v. RIZZO, 3 Ill. 2d 291, 299-300, said:

> "The requisites of a partnership are that the parties must have joined together to carry on a trade or venture for their common benefit, each contributing property or services, and having a community of interest in the profits. (Parish v. Bainum, 306 Ill. 618, 623; Ill. Rev. Stat. 1949, chap. 106-1/2, par. 6.) It has been held that, as between the parties, the existence of a partnership relation is a question of intention to be gathered from all the facts and circumstances. (Goacher v. Bates, 280 Ill. 373.) Written articles of agreement are not necessary, for a partnership may exist under a verbal agreement, and circumstances may be sufficient to establish such an agreement. (Einsweiler v. Einsweiler, 390 Ill. 286, 291; Haug v. Haug, 193 Ill. 645, 647.) Such factors as the mode in which the parties have dealt with each other; the mode in which each has, with the knowledge of the others, dealt with other people, (Van Buskirk v. Van Buskirk, 148 Ill. 9;) and the use of a firm name, (Einsweiler v. Einsweiler, 390 Ill. 286,) have been deemed material in determining the existence of a partnership. The essential test, however, is the sharing of the profits, (Parish v. Bainum, 306 Ill. 618,) but it is not necessary that there be a sharing of the losses in order to constitute a partnership. (Clemens v. Crane, 234 Ill. 215; Carter v. Wright, 275 Ill. App. 224, 230; Fougner v. First Nat. Bank, 141 Ill. 124.) Mere participation in the profits, however, does not of itself create a partnership. Schumann-Heink v. Folsom, 328 Ill. 321."

When these and other applicable principles are applied to circumstances shown in the record at hand, we are of the opinion that, in accordance with the intent of the parties, a partnership relation with Ruth did come into existence at some time during 1963, after the death of Aloysius.

Edwin appears to have acted as spokesman and agent for Edwin, Jr., Marcella and Joan in the dealings with Ruth and, apart from the manifestations in his letter of January 31, 1963, there was no effort on either side, or by the decedent's executor, to resolve and settle the partnership affairs. Thereafter, when it came time to file the 1963 tax return, Ruth was shown to be a partner to whom partnership income ($2,576.12) had been distributed and was also shown as the owner of capital ($28,549.28)

in the business. The same was true in each and every tax return filed in succeeding years to and including 1970. In a letter of March 23, 1965, wherein partnership income of $275.94 was distributed to Ruth, Edwin also wrote: "The $1,000.00 check is a payment on your capital account. You do not have to pay income tax on this because it is part of the original investment in the business. This reduces your capital account by $1,000.00." Again, early in 1968, Edwin sent Ruth a copy of the 1967 tax return, together with an income check for $2,741.43, and also wrote: Besides this check we can offer you $12,000.00 for your share of the business." Generally speaking, almost every letter written to Ruth over the years contained some manifestation that the Kewanee Kellers considered her to be a partner. And it appears that the business was run, and partnership profits disposed of, precisely as they had been prior to the death of Aloysius, the only change being that Ruth was placed in the shoes of her husband. From all of the circumstances, we conclude that a partnership with Ruth did come into existence.

Sections 21(1) and 22(b) of the Uniform Partnership Act combine to give a partner a right to a formal accounting as to partnership affairs (1969 Illinois Revised Statutes, Ch. 106-1/2, pars. 21(1) and 22(b)), and bearing in mind that the right was not asserted here until the complaint was filed March 22, 1971, it is our opinion that the propriety or impropriety of the trial court's refusal to grant Ruth an accounting for the years 1963 through 1971 is made to depend on whether the court was correct in its further ruling that plaintiffs had entered into a binding agreement to compromise and settle their interest for $15,000.00. If there was a valid and binding agreement to compromise and settle for the fixed sum, any right to an accounting was waived. If no such agreement was reached, the plaintiff Ruth Keller, as a partner, is entitled to an accounting.

A contract or agreement may be created by the exchange of letters (DANA v. SHORT, 81 Ill. 468; KNOWLES v. HASTINGS, 314 Ill. App. 574), and in our opinion the record supports the finding of the trial court that a binding agreement to settle the partnership affairs completely as between the Kewanee Kellers and the California Kellers was entered into in this case. At the time the contract was formed, Ruth was considered to be, and treated, in effect, as a partner by all concerned, including her own children who are plaintiffs here, and who have judicially admitted in their complaint that their mother was a partner, to the exclusion of any interest they may have acquired by the terms of their father's will. Ruth's letter of May 9, 1969, stated that the matter of "settling the partnership" had been discussed with her attorney and her son and in clear and definite terms offered to take $15,000.00 in settlement for her share in the partnership. In equally clear and definite terms, Edwin's letter of May 21, 1969, accepted that offer. The time of acceptance was reasonable, the terms of the contract were agreed upon, and nothing remained to be done but to carry it into effect. In her letter of July 27, 1970, Ruth confirmed that the settlement agreement had been made and sought to expedite payment under the terms of the agreement. Accordingly, we conclude that the trial court properly found the settlement contract to be binding and valid, and properly denied the prayer for an accounting.

Plaintiffs contend alternatively that Ruth is entitled to an accounting because the will of Aloysius gave her a life estate in his property. We do not find that this issue was raised and passed upon in the trial court and it is not properly before us for review. The entire theory in the trial court was that Ruth was entitled to relief as a partner. A party may not proceed on one theory in the trial court and yet another on appeal (NIELSEN v. DUYVEJONCK, 94 Ill. App. 2d 224).

Generally, a partner is not entitled to compensation for his services in attending to partnership business unless there is a special agreement among the partners entitling him to do so (BACH v. BACH, 373 Ill. 442; 1969 Illinois Revised Statutes, Ch. 106-1/2, par. 18(f)). It is contended by plaintiffs that Ruth, being a partner whose agreement was not obtained, is entitled to recover one half the salaries paid to Edwin, Jr., Marcella and Joan during the years 1963 through 1970. While we believe that Ruth's knowledge of the practice of paying salaries to the working partners, and the circumstances of the case, would permit a finding by the court of an implied agreement by the partners authorizing the contested salaries, we feel that it is clear that this claim was waived and released by the contract for compromise and settlement entered into by the parties.

It is also contended by plaintiffs that the trial court erred in denying plaintiffs' motion for summary judgment; that it was error to deny their motion to strike a defense raised in defendants' answer to the amended complaint, for reason that it was inconsistent with the theory of defendants' counterclaim; that the court erred in denying a motion for continuance; and that they were denied a fair trial due to the bias of the trial judge.

There is nothing in the record which indicates that the trial judge was biased or acted in any manner so as to deny plaintiffs a fair trial. On the basis of our disposition of this cause, we see no purpose in extending this opinion by a detailed discussion of the other matters referred to by plaintiffs. We see no merit in the assertions by plaintiffs, in view of our conclusion that the record sustains the finding of the trial court that there was a settlement agreement entered into between the parties.

Since we find no justifiable basis for reversal of the judgment of the trial court, such judgment of the Circuit Court of Henry County will be affirmed.

Judgment affirmed.

Stouder, P. J. and Dixon, J. concur.

4 I.A.3 90

71-158 STATE OF ILLINOIS

PEOPLE, COBA PALMER V. JOHN J. TWOMEY

ABST.

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-two, within and for the Third District of Illinois:

Present— PC

HONORABLE ALLAN L. STOUDER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on MARCH 7, 1972 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 71-158

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1972

PEOPLE OF THE STATE OF ILLINOIS Ex rel, COBA PALMER, No. 63716, Petitioner-Appellant, vs. WARDEN JOHN J. TWOMEY, Illinois State Penitentiary, Joliet, Respondent-Appellee.	)	Appeal from the Circuit Court of Will County

PER CURIAM OPINION

Abstract

This is an appeal from an order of the Circuit Court entered February 18, 1971, dismissing defendant Coba Palmer's pro se petition for writ of Habeas Corpus. Counsel appointed to represent defendant on his appeal in this court has filed his motion pursuant to Anders v. California, 386 U.S. 738, representing that an appeal is wholly frivolous.

The only allegation of defendant's petition relating to claimed unlawful detention refers to the failure of the trial court to appoint counsel for him at the prelimary hearing and arraignment. Defendant was incarcerated pursuant to the judgment of conviction and sentence of the Circuit Court of McLean County.

The office of Habeas Corpus is to secure the release of a prisoner detained by an order of Court which is absolutely void by reason of lack of jurisdiction over the person of the defendant, or the subject matter, or where something has happened since incarceration which would entitle defendant to his release. People ex rel Lewis v. Frye, 42 Ill. 2d 311, 247 N.E.2d 410 and People ex rel. Totten v. Frye, 39 Ill. 2d 549, 237 NE. 2d 709. Non jurisdictional error, even if of constitutional proportions, are not an appropriate basis for awarding relief in

Habeas Corpus cases. People ex rel Shelley v. Frye, 42 Ill. 2d 263, 246 N.E. 2d 251 and People ex rel Charles Edward Lewis v. Frye, 42 Ill. 2d 58, 245 N.E. 2d 483.

Since defendant's petition did not allege any facts affecting the jurisdiction of the court which entered the judgment of conviction and sentence nor any other facts entitling defendant to discharge, the trial court properly dismissed the petition.

For the foregoing reasons the motion of Bruce Stratton, District Defender of the Illinois Defender Project, for leave to withdraw as counsel for Coba Palmer is granted and the judgment is affirmed.

JUDGMENT AFFIRMED.

4 I.A.3 97

72-31 STATE OF ILLINOIS

PEOPLE VS. CLARENCE MELVIN SUTTON

ABST.

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-two, within and for the Third District of Illinois:

Present— PC

HONORABLE ALLAN L. STOUDER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on MARCH 7, 1972 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 72-31

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1972

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CLARENCE MELVIN SUTTON, Defendant-Appellant.	Appeal from the Circuit Court of Hancock County Honorable John W. Gorby

PER CURIAM OPINION

Abstract

Defendant, Clarence Melvin Sutton, pleded guilty to the offense of burglary in the Circuit Court of Hancock County on November 12, 1970 and was sentenced to from three to six years in the penitentiary. On June 16, 1971, he filed his petition for post conviction relief, counsel was appointed and after hearing on October 1, 1971, the petition was denied which order is the subject of this appeal.

Counsel, appointed to represent defendant on this appeal, has filed his motion pursuant to Anders v. California, 386 U.S.738, alleging that an appeal would be wholly frivolous and requesting leave to withdraw as counsel.

According to the motion and memorandum in support thereof the principal basis for defendant's request for post conviction relief was his claim that his privately retained counsel had represented to him that if he did not plead guilty to the burglary charge, the defendant would be charged with an additional offense of rape. As a result of such representation defendant claimed in his petition and at the hearing thereon that such representation amounted to coercion and consequently his plea was not voluntarily entered.

A review of the record, the post conviction petition and the hearing thereon indicates that defendant was properly charged with a crime, represented by a

privately retained counsel, properly warned of his rights and the only issue complained of is the alleged coercive effect of the representation of defendant's counsel.

At the hearing on the post conviction petition defendant's evidence tended to support the allegations of his petition but the trial court held that viewing such representations and evidence most favorable to defendant failed to support defendant's claim of improper coercion.

People v. Wilbourn, 268 N.E. 2d 418, People v. Sephus, 262 N.E. 2d 914, People v. Worley, 256 N.E. 2d 751 and People v. Stephenson, 246 N.E. 2d 269, are controlling authority for the proposition that fear or apprehension of increased punishment does not render a plea involuntary.

Accordingly the motion of Bruce Stratton, District Defender of the Illinois Defender Project, is granted leave to withdraw as counsel for defendant and the judgment is affirmed.

JUDGMENT AFFIRMED.

4IA3 112

(24540—4M—9-70) 160-o

STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 8th day of March A. D. 1972, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11665 Agenda No. 72-18

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee -vs- STEVEN J. HANKINS, Defendant-Appellant	)	Appeal from Circuit Court Cass County

MR. JUSTICE SIMKINS delivered the opinion of the court:

Defendant, Steven J. Hankins, was convicted of the crime of Aggravated Battery on a plea of guilty entered February 6, 1968. He was sentenced to an indeterminate term of two to eight years. He subsequently filed, pro se, a Petition for Post-Conviction Hearing and requested appointment of counsel which request was allowed. This appeal is from the order of the Trial Court dismissing the Petition. No evidence was heard and no amended petition was filed.

The record here reveals that counsel appointed to represent the defendant in the prosecution of his Post-Conviction Petition did not communicate with the defendant.

The order of the Trial Court dismissing the Post-Conviction Petition is reversed and the cause remanded with directions to appoint other counsel and for compliance with the minimum standards prescribed in Supreme Court Rule 651(c) and in People v Slaughter, 39 Ill.2d, 278, 235 N.E.2d, 566.

Reversed and Remanded with Directions.

Trapp, P.J. and Craven J. concur.

4IA3

4 I.A.3 152

CHICAGO BAR ASSOCIATION

55563

JERRY E. KADANSKY and JANET KADANSKY,

Plaintiffs-Appellees,

vs.

ALBERT R. FICKETT and SHIRLEY FICKETT,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

ABST.

HONORABLE DONALD J. O'BRIEN, PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

Plaintiffs sued for specific performance based upon an option contract to purchase a parcel of land owned by defendants. Following a bench trial, a decree for specific performance was entered in plaintiffs' favor. Defendants appeal from that decree.

The record discloses that plaintiffs and defendants entered into an agreement in June 1967 whereby plaintiffs were given an option to purchase certain real estate owned by defendants on or before the expiration date of September 30, 1967. On September 29, 1967, a letter was sent by plaintiffs' attorney to defendants' attorney. That letter stated the following:

* * *

> Please be advised that my clients Jerry E. Kadansky and Janet A. Kadansky wish to exercise their option to purchase the property described below pursuant to the terms of their Option Contract.
>
> Lot 5 in Earl J. Clopp's Subdivision, in the Southwest 1/4 of Section 7, Township 37 North, Range 13 East of the Third Principal Meridian.
>
> Mr. Kadansky has advised me that our clients have agreed in a general way to method of payment which varies with that set out in the agreement. Please let me know if this is correct.

* * *

Plaintiffs' attorney testified that he also sent a copy of the letter to defendants, but they denied having ever received a copy.

In any event, the trial court found that plaintiffs had on September 29, 1967, "duly exercised their option in accordance with the terms of the said contract" and thus granted plaintiffs the relief sought.

Defendants have advanced several cogent arguments to support their challenge of the trial court's decree. Initially, they contend that the letter of September 29, 1967, the contents of which we have set out above, did not constitute a legally valid exercise of the option to purchase defendants' real estate, but rather suggested a mere desire on plaintiffs' part to exercise the option in futuro according to new terms to be agreed upon by the parties. Defendants argue that the letter constituted at most a counter-offer and they cite numerous authorities in support of their view. See, e.g., Furla Studios, Inc. v. Gillen, 1971, ___ Ill.2d ___, 273 N.E.2d 220; Department of Public Works and Buildings v. Halls, 1966, 35 Ill.2d 283; Morris v. Goldthorp, 1945, 390 Ill. 186. In response to defendants' initial contention, plaintiffs admit that the language of the letter was carelessly drafted, but argue nevertheless that the letter indicated their clear intent to exercise the option in praesenti according to the expressed terms of the original agreement.

We have carefully examined the authorities cited by both sides and conclude that defendants' contention is a meritorious one. It is quite clear that courts have adopted a very strict attitude when construing attempts by an optionee to exercise an option. Furla Studios, Inc. v. Gillen, 1971, ___ Ill.2d ___, 273 N.E.2d 220, 223; Williston on Contracts, 3rd Edition, § 61D, Exercise of Options. This strict attitude simply reflects a judicial recognition that in most option contracts an optionee is given a great deal of control over the property of another for generally nominal consideration and, under such circumstances, it would be

grossly unfair to the property owner if a liberal rule of construction were applied. An option agreement is really little more than a continuing offer by a seller to a prospective buyer, set to expire at some fixed time. If a court was to enforce an option upon terms other than those precisely spelled out in the option agreement, it would be modifying the terms of the seller's offer and, indeed, would be making a contract for the parties upon terms neither agreed upon nor bargained for by the seller. Such action is, of course, beyond the province of a court in suits for specific performance. See Furla Studios, Inc. v. Gillen, 1971, ___ Ill.2d ___, 273 N.E.2d 220, 223 and cases cited therein.

Applying a strict rule of construction to the language of the letter sent by plaintiffs' attorney in the instant case, we are constrained to hold that it wholly fails to constitute an in praesenti exercise of plaintiffs' option upon the precise terms of the option agreement. The letter does not indicate that plaintiffs do hereby exercise the option, but that they "wish to." Moreover, and more importantly, the letter suggests on one hand that plaintiffs unequivocally accept the precise terms of the agreement, i.e., offer to sell, and then it seemingly modifies the acceptance by references to new terms. As stated in Worley v. Holding Corporation, 1932, 348 Ill. 420 at page 425:

> * * * A letter written in reply to an offer, which restates the terms of the offer, but with some variations, though slight, cannot be regarded as the consummation of a contract, and requires an acceptance upon the terms thus stated, and, until unequivocally accepted, is only a mere proposition or offer.

We believe that this language squarely applies to the letter written in this case. Hence, we must reverse the judgment of the trial court. Having thus decided, we need not consider defendants' remaining contentions.

The decree is reversed and the cause is remanded with

directions to dismiss the complaint for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

GOLDBERG, P.J. and BURKE, J., concur.

24 I.A.3 306

71-116

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On March 7, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

MAR 7 1972

HOWARD R. KELLETT, Clerk
Appellate Court, 2d District

No. 71-116

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JACK M. HAWKINS, GERTRUDE A. HAWKINS, ADELLA PUIKIS, ADAM TALAREK and CATHERINE TALAREK, Plaintiffs-Appellants, vs. THE COUNTY OF DU PAGE, Defendant-Appellee.	Appeal from the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois.

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Plaintiffs seek a declaratory judgment that the County of DuPage zoning ordinance is void as applied to their property. The trial court entered judgment in favor of the defendant, from which the plaintiffs have appealed.

The property in question consists of four contiguous parcels of land totaling approximately six acres, and is vacant except for one older frame farm house. It is situated on the east side of Route 83 (also known as the Kingery Expressway), about one-half to one mile south of Interstate 55 (the Stevenson Expressway). Three of the parcels extend 290 feet east from Route 83, while the fourth extends 580 feet east, to Meadowbrook Drive. The property is presently zoned for single family residence, and the County denied plaintiffs' petition to have it rezoned as a General Retail District so that a motel, restaurant, and gasoline station could be constructed.

Route 83 is a heavily traveled, four lane, divided highway. A 1968 map prepared by the Department of Public Works and Buildings showed Route 83 to be carrying 14,000 cars a day immediately south of I-55 and 19,600 a day north of I-55. This is compared to traffic of 1,100 cars a day in 1965. The 1968 daily count on I-55 immediately west of Route 83 was 37,400, and east of Route 83 it was 44,000.

To the east of the subject property are four single family lots fronting on the west side of Meadowbrook Drive. Farther east, the property is all single family residential. Northeast of the subject property, Meadowbrook Drive becomes 73rd Court and turns west toward Route 83. Southeast of the subject property, Meadowbrook Drive becomes Circle Avenue and also turns to the west, intersecting Route 83 approximately 700 feet south of the subject property. Circle Avenue, Meadowbrook Drive, and 83rd Court constitute a frontage road providing access to the Hinsdale Industrial Park, a 73 acre industrial complex 400 to 500 feet northeast of the subject property and zoned as a Restricted Manufacturing District.

The land north of and adjacent to the subject property is occupied by the Vineyard Well Drilling Company, as a non-conforming use. To the north of this and all along Meadowbrook Drive are single family residences. Approximately one-half mile north of the subject property is the interchange of Route 83 and I-55. North of the interchange on the east side of Route 83 is a large industrial complex and an airport. The Western Development Company has contracted to purchase this airport and construct a regional shopping center containing 933,000 square feet of shopping space on the site, with completion estimated in five years. Immediately north of the industrial complex, one-quarter mile north of the interchange, is a 120 unit Holiday Inn, and north of that is a Texaco service station.

North of the interchange on the west side of Route 83 are the Picadilly Trace Apartments, a multi-family project of 700 or 800 units in two and two and one-half story buildings.

Between the south end of the subject property and Circle Avenue are three single family residences, ranging in value from $22,000 to $40,000. South of the intersection of Route 83 and Circle Avenue, on the east side of Route 83, is some vacant property, and one mile south of the subject property is a complex containing 1500 apartments.

On the west side of Route 83, immediately across from the subject property and extending three blocks west from Route 83, is a subdivision of single family houses ranging in value from $18,000 to $30,000. With the exception of one house, all those located on Route 83 face away from the highway. West of this subdivision, and somewhat to the north, are some old single family housing, vacant land, and small commercial establishments, including a motel and bar.

The plaintiffs desire to use the land for the construction of a two story, eighty unit Howard Johnson Motel with an adjoining restaurant and a gasoline station. It is also planned that a new frontage road will be constructed, which will run parallel to Rouse 83 and connect with the present frontage road at a point just north of the plaintiffs' property. This new frontage road would not only provide access to the motel, but would also extend to the Hinsdale Industrial Park.

John Raine, a real estate representative employed by the Standard Oil Company, testified for the plaintiffs that there is a need for a service station in the area, and that the proposed site is a prime location because of its close proximity to the interchange.

Thomas Murphy, a city planner and graduate architect, testified for the plaintiffs that numerous zoning changes have occurred

in the neighborhood since 1961, and pointed out that during this time only one new home was constructed in the area. He stated that, in his opinion, the highest and best use of the subject property would be that proposed by the plaintiffs.

Don P. Neuses, a real estate broker and appraiser called by the plaintiffs, testified that in his opinion the highest and best use of the subject property is commercial. In arriving at that opinion, he considered the fact that the neighborhood is greatly affected by the interchange of Route 83 and I-55, and that this made it undesirable for single family residential purposes. It was his opinion that the property, including the one house presently improving it, is worth approximately $40,000 to $50,000 as presently zoned, but would have a value of approximately $310,000 if rezoned.

M. A. Brown, a realtor and appraiser, testified for the defendant that the property as zoned is worth $75,000, and would be worth three times that amount if rezoned as the plaintiffs desire. He stated, however, that a rezoning would have a detrimental influence of approximately 10-15% on abutting properties, and a somewhat lesser effect on properties further away.

William S. Lawrence, a city planning and zoning consultant, testified for the defendant that the highest and best use from a planning and zoning standpoint would be for single family homes. In arriving at this opinion he took into account all of the existing uses in the area. He said that the development of the area is continuing as single family, although he could not recall any new single family construction on Route 83. He further stated that in his opinion I-55 is the boundary of influence on the subject property, with uses north of I-55 having no effect on properties south of the highway.

David C. Auble, a real estate appraiser called by the defendant, testified that the subject property is worth $40,000 as

presently zoned, and would have a value of about $290,000 if rezoned. It was his opinion that, taking into consideration existing uses, trends in the neighborhood, and traffic flow on roads abutting the subject property, the highest and best use of the property is residential. He felt that this would promote the greatest social and economic benefit to the community, and would provide the highest net return to the property for the longest period of time. Auble stated that a rezoning would decrease the value of several abutting lots, but that the proposed frontage road would benefit anyone living on Meadowbrook Drive since the frontage road would divert traffic to the industrial park. He agreed with Mr. Lawrence that I-55 is a cutoff point so that uses on one side of it do not effect properties on the other side.

A zoning ordinance is presumed valid, and the party attacking it has the burden of proving by clear and convincing evidence that, as to his property, the ordinance is arbitrary, unreasonable, and without substantial relation to the public health, safety, morals, or general welfare. Camboni's, Inc. v. DuPage County, 26 Ill.2d 427, 432, 187 N.E.2d 212 (1962); Marquette Nat. Bk v. County of Cook, 24 Ill.2d 497, 501, 502, 182 N.E.2d 147 (1962); Bennett v. City of Chicago, 24 Ill.2d 270,273, 274, 181 N.E.2d 96 (1962). While no single factor is determinative of the issue, and each decision must depend on the particular facts of that case (First National Bank v. County of Cook, 15 Ill.2d 26, 31, 153 N.E.2d 545 (1958); Fiore v. City of Highland Park, 76 Ill.App.2d 62, 73, 221 N.E.2d 323 (1966)), the factor of greatest importance is the existing use and zoning of nearby properties. Ryan v. City of Elmhurst, 28 Ill.2d 196, 198, 190 N.E.2d 737 (1963); Jacobson v. City of Evanston, 10 Ill.2d 61, 70, 139 N.E.2d 205 (1956). Other factors to be considered are the character of the neighborhood, the extent to

which the value of the subject property is diminished by the restrictions of the ordinance, the extent to which the removal of the limitation would depreciate the value of other properties in the area, and the relative gain to the public compared with hardships imposed on individual property owners.

We affirm the trial court judgment holding the County of DuPage zoning ordinance constitutional. Clearly, the surrounding area is predominantly residential. The only commercial uses in the immediate vicinity of the subject property are a nonconforming use directly to its north, and the Hinsdale Industrial Park some 400 to 500 feet to the northeast. The fact that several commercial establishments are located north of I-55 is not relevant, since there is adequate testimony that I-55 serves as a buffer between properties on either side of the highway. Except for the Hinsdale Industrial Park, which is zoned for manufacturing, the entire area is zoned for single family residence. Neither the nonconforming use to the north nor the close proximity of the Industrial Park alter the otherwise residential character of this property.

The factors which favor the plaintiffs are not strong enough to outweigh the residential nature of the neighborhood. That the property, if zoned as plaintiffs propose, would have a greater value than if used as presently zoned, while a factor to be considered, is by no means decisive in determining the reasonableness of the existing classification. See River Forest Bk. & Tr. Co. v. Maywood, 23 Ill.2d 560, 563, 179 N.E.2d 671 (1962); Jacobson v. City of Evanston, 10 Ill.2d 61, 68, 139 N.E.2d 105 (1956). Likewise, the nearness of the subject property to the interchange of two heavily traveled highways, while affecting the desirability of the location for residential purposes, is not conclusive of the unreasonableness of the ordinance. See LaSalle Nat. Bk. v. Vil. of Skokie, 26 Ill.2d 143, 146, 186 N.E.2d 46 (1962); River

Forest Bk. & Tr. Co. v. Maywood, supra, at 563; Wehrmeister v. County of DuPage, 10 Ill.2d 604, 609, 141 N.E.2d 26 (1957). Although there has been little new residential construction in the area, the experts differed on whether the best use for the property was residential or commercial.

The cases on which plaintiffs rely are distinguishable on their facts. In Dixon v. County of Kane, 77 Ill.App.2d 338, 222 N.E.2d 354 (2d Dist. 1966), plaintiff desired to construct a service station on his residentially zoned property, which was 700 feet south of the newly constructed East-West Tollway. The court found that the trend of development in the area was toward non-single family uses, and that the bulk of nearby properties were either zoned or used for business purposes or for purposes not compatible with single family residence uses. In fact, the defendant had rezoned the northeast corner of the same intersection where plaintiff's property was located for business purposes, and another gas station was operating there. The court found it difficult to conceive that good planning would permit one gas station while prohibiting another directly across the street. In Schiffer v. Village of Wilmette, 105 Ill.App.2d 80, 245 N.E.2d 143 (1969), plaintiff sought to construct a service station on his residentially zoned property located on Lake Street one block east of the Edens Expressway. The court noted the high volume of traffic on Lake Street, and the nearby commercial uses. It held defendant's zoning ordinance unconstitutional, saying that the subject property took its character from the commercial uses in the vicinity, including two gas stations just one block away (one of which was on the same block). Similarly, in Petropoulos v. City of Chicago, 5 Ill.2d 270, 125 N.E.2d 522 (1955), plaintiff was successful in having residential zoning declared unconstitutional as to his property, and was thus able

to construct a service station. Two other corners of the intersection where his property was located were already occupied with filling stations, and other nearby property was being used for business and industrial uses. In Hartung v. Village of Skokie, 22 Ill.2d 485, 177 N.E.2d 328 (1961), the court struck down a residential zoning ordinance, thus allowing the plaintiff to construct a motel and restaurant. The court noted that there were no single family residential uses on the block where the subject property was located, and that the residential zoning classification did not reflect the use, development, or growth trend in the area.

All of the above cases contained the common element of heavy traffic. But in each, the major consideration of the court was the influence of the existing commercial uses in the immediate vicinity. Here, the subject property is in the midst of a single family residence district. The trial court also found that the area of substantial change was north of I-55, and that the freeway acted as a buffer. The findings are not against the manifest weight of the evidence and the judgment is affirmed.

AFFIRMED.

GUILD and MORAN, J.J. Concur.

71-90

04 I.A.3 307

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On March 8, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-90

Abstract

FILED

MAR 8 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE

APPELLATE COURT OF ILLINOIS

Second Judicial District

VILLAGE OF ROUND LAKE PARK, a Municipal Corporation, Plaintiff-Appellee, vs. WILLIAM ANEST, Defendant-Appellant.	)	Appeal from the Circuit Court of Lake County, Illinois.
	)	
	)	Honorable Paul C. Kilkelly, Magistrate Presiding.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

The issues presented for review are: (1) whether the Village of Round Lake Park can legally prosecute a person for the violation of its ordinance affecting that portion of its waterworks system which is located in another municipality; and (2) whether evidence was introduced which would sustain the findings of guilty in the trial court after a bench trial.

On July 10, 1970, the defendant wrote plaintiff Village a letter, and as a result negotiated with the Village the right to receive water for 90 days on the promise that the property receiving water would be annexed to the Village of Round Lake Park. Thereafter, on September 25, 1970, the defendant's attorney wrote the attorney for the Village stating that the defendant's property could not be annexed to the Village because it was not contiguous thereto and requested that the water, being supplied to the gas station on defendant's property, not be shut off. The gas station is located in the Village of Hainesville which is adjacent to the plaintiff Village. Defendant had leased the gas station to two

individuals who are not named as defendants herein.

Two complaints were issued against the defendant. The first charged that the defendant "turned water on or had water turned on at above address which said party owns or has possession of, after said water was turned off by Village Water Department employees on November 20, 1970, and used same unlawfully and illegally"; the second complaint charged an identical violation after the water was turned off by the Village employees on the date of November 23, 1970. The two complaints were consolidated for trial, the defendant was found guilty, and a fine of $20 was levied in each case.

Although defendant contends that a village has no authority to enforce a municipal ordinance within the boundaries of another municipality, an examination of the statutes and applicable cases reveal that, on the factual situation herein, the defendant's contention is without merit. The Municipal Code of Illinois gives cities or villages jurisdiction over its waterworks for 20 miles beyond its corporate limits or so far as the waterworks may extend (Ill. Rev. Stat. 1969, ch. 24, par. 11-125-2), and gives any municipality with a population of less than 500,000 authority to operate a waterworks system, or water supply system, either within or outside of the corporate limits (Ill. Rev. Stat. 1969, ch. 24, par. 11-129-1). In addition, the corporate authorities may make all needful rules and regulations concerning the use of water supplied by its waterworks and for the management or control of its waterworks (Ill. Rev. Stat. 1969, ch. 24, par. 11-125-3). Naturally, the corporate authorities can pass ordinances that they deem proper or necessary to carry into effect the powers granted to them and have the right to impose fines or penalties for violations of the ordinances so adopted.

Nothing is contained in the record which reveals whether or not the Village of Hainesville has or does not have a waterworks of its own, or whether or not there is any agreement as to joint use of the waterworks of the Village of Round Lake Park. Therefore, we do not inquire into the provisions of the statute pertaining to joint use or construction of waterworks by one or more cities or villages.

In The Chicago Packing and Provision Co. v. The City of Chicago, 88 Ill. 221, the City of Chicago had an ordinance which required all meat packing houses to be licensed by the City of Chicago if they were within the city limits or within one mile thereof. The defendant, a meat packing house, which was located within a mile of the City of Chicago, but within the boundaries of the Village of Lake, had not obtained a license from the City of Chicago. It did obtain a license from the Village of Lake. When sued by the City of Chicago for violating the ordinance requiring the licensing of packing houses, the defendant unsuccessfully contended that the City of Chicago could assert no control over its business and that the plaintiff's ordinance was not effective extraterritorially. The court there stated that the general assembly, for police purposes, can prescribe the limits of municipal boundaries even though those boundaries may lap over territory in the limits of other municipalities. However, if the general assembly does not confer power to exercise jurisdiction outside its boundaries, the city cannot do so. (Dean Milk Co. v. City of Elgin, 405 Ill. 204.) The extension of jurisdiction in a case such as the one we are considering is a delegation of the police power of the State by statutes. The police power may

be delegated to municipal corporations to be exercised for the welfare, safety and health of the public, and under the police power the municipal corporation may enact reasonable ordinances. (County of Cook v. City of Chicago, 311 Ill. 234, 237). It cannot be contended that a municipal water supply is not vital to public health and safety. City of West Frankfort v. Fullop, 6 Ill. 2d 609, 614.

Although the challenged ordinance is valid, the plaintiff has not met the burden of establishing a violation thereof, by the defendant, by a preponderance of the evidence. To sustain a conviction on either complaint, the plaintiff would have to establish that the defendant turned the water on at the service cock on the property in question after it had been turned off, or that the defendant used water after it had been turned on by him. The testimony reveals that Clarence Porter, the Superintendent of Public Works for the Village of Round Lake Park, went to the property in question on November 18, 1970, and shut the water off but turned it back on and left after the defendant shouted, "Get off my property and you turned my water off." On the 20th day of November, 1970, Porter went back with an Officer Robinson in a squad car, but the defendant was not present. At that time, Porter shut the water off. On the 23rd of November, 1970, Porter went back to get a final reading on the meter, found that the water was turned on, but he did not turn the water off. The plaintiff states that this evidence, together with the fact that the defendant wrote the Village of Round Lake Park to obtain water service for the gas station, and had an interest in obtaining water for the gas station as he was the owner of the property, leads to the conclusion that the defendant benefited from the use of the water,

was not paying for it, and turned it on without authority. Plaintiff concedes there is no direct evidence that the defendant turned the water on, or that he personally used the water, but contends the circumstantial evidence is sufficient to warrant a finding of guilty on the part of the defendant for violating the village ordinance.

Our conclusion is that the verdicts of guilty are against the manifest weight of the evidence and cannot stand. There is nothing in the record which indicates that the water was turned back on by the defendant, as charged in the first complaint, after being turned off on November 20, 1970. The gas station was leased by the defendant to two individuals who also were interested that the water be turned on, used by the gas station, and who would benefit therefrom. There is no evidence that water was actually used. If the evidence presented was sufficient to sustain a finding of guilty as to the defendant, the same evidence would have been sufficient to find either or both of the tenants guilty of the same violation. The shut-off valve, in question, was located in a place available to either the defendant, the tenants, or the general public. The evidence was not sufficient for the court to find the defendant guilty on the first complaint.

As to the complaint that the defendant turned on the water after it had been turned off by village employees on November 23, 1970, there is absolutely no evidence that the water was ever turned off on that date and, therefore, no violation of the ordinance by the defendant, or anyone else, could have occurred as charged.

The judgments of the circuit court of Lake County are reversed.

Judgments reversed.

SEIDENFELD, P. J. and GUILD, J., concur.

71-160

04 I.A.3 308

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Acting Presiding Justice
Honorable JOHN A. KRAUSE, Justice
Honorable ALFRED E. WOODWARD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On March 8, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-160

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

FILED

MAR 8 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee vs. VINCENT L. JOHNSON a/k/a EARL JOHNSON a/k/a ELVIN COOK a/k/a JESS PITMAN a/k/a JESSIE STOKES a/k/a EARL GOODMAN, Defendant-Appellant	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendant was charged with two co-defendants under a five count indictment with the crimes of burglary and four counts of theft in excess of $150.00. On January 6, 1971, after a hearing on a motion to suppress evidence, the matter proceeded to trial before a jury with each of the defendants represented by private counsel. On January 8, a mistrial was declared. Plea negotiations were then commenced and, as a result, the defendant pled guilty to one of the counts of theft and was sentenced to

the penitentiary for a term of 2 to 6 years in accordance with the plea agreement. The other counts were dismissed with prejudice.

On January 13, the defendant, through the district defender of the Illinois Defender Project, filed a notice of appeal. On September 7, the defender filed a motion to withdraw as counsel for the defendant on the grounds that there was no justiciable issue for review and that a request for review would be frivolous. A copy of the motion was furnished the defendant together with our order that he file any matters why the motion should not be allowed or any additional matters by October 15. The defendant has not filed anything further.

We have reviewed the record relative to the plea agreement in some detail. It appears that the attorneys for each of the three defendants and the state disclosed to the court in chambers the tentative plea agreement of the parties. The court discussed at considerable length his role in plea agreements and questioned each of the defendants as to his background. The court was advised that under the proposed agreement the defendant would be sentenced to a term of 2 to 6 years in the penitentiary for a plea on one count of theft and the other counts would be dismissed. The defendant indicated that he understood and agreed with the terms of the proposed agreement. The court indicated his concurrence with that disposition of the matter and the parties returned to open court.

The record next discloses that the trial court scrupulously

followed the procedures set forth in Supreme Court Rule 402 (Ill. Rev. Stat. 1971, Ch. 110A, sec. 402) before accepting the plea of guilty. The defendant was informed, and indicated he understood, the nature of the charge; the minimum and miximum sentence that could be imposed; his right to plead not guilty; and his right to trial. It does appear that the court did not repeat, in open court, the terms of the sentence to be imposed in accordance with the agreement before accepting the plea. The court did state, however, that the plea was based on the negotiations discussed in chambers. Since the sentence had been disclosed, together with the complete agreement, only moments earlier, that oversight could hardly be considered serious.

Accordingly, the motion of the defender to withdraw will be allowed and the appeal dismissed.

APPEAL DISMISSED.

WOODWARD AND KRAUSE, J. J., Concur.

4 I.A.3 336

71-107

PEOPLE ex rel Davis vs. Twomey

STATE OF ILLINOIS

ABST.

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-one, within and for the Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, SHERIFF

BE IT REMEMBERED, that afterwards on JANUARY 5, 1972 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 71-107

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1972.

PEOPLE OF THE STATE OF ILLINOIS, Ex Rel, KEITH RUSSELL DAVIS, No. 66251, Petitioner-Appellant, vs. WARDEN JOHN J. TWOMEY, Joliet Illinois State Prison, Respondent-Appellee.	)	Appeal from the Circuit Court of Will County.

PER CURIAM

Motion to withdraw as counsel has been filed in this Court by Bruce Stratton, District Defender of Illinois Defender Project, who was appointed as counsel for defendant Keith Russell Davis in this cause. Such counsel indicates that an appeal in this cause could not be successful and that such appeal would be wholly frivolous. We have accordingly examined the entire record in this cause.

Defendant had filed his pro se petition for Writ of Habeas Corpus on December 31, 1970. The petition was dismissed for failure to state any factual allegations upon which relief could be granted, by the Circuit Court of Will County. On February 18, 1971, counsel who now represents Keith Russell Davis, was appointed.

Essentially, defendant-petitioner, Keith Russell Davis, asserted in his petition that he sought release from custody of the Warden of the Illinois State Prison and contends that the Warden is detaining him unlawfully by refusing to credit him with "good time" deduction from his service to which he is entitled. Appellate counsel was advised by the Board of Pardons and Paroles on September 14, 1971, that defendant had been released on March 1, 1971. Since defendant had asked only that he be released and was in fact thereafter released from custody the question of defendant's release is now moot.

We believe that there has been adequate compliance with ANDERS v. CALIFORNIA, 386 U.S. 738, by counsel and the court and that the appeal in this case should be dismissed. Such appeal is accordingly dismissed.

Appeal Dismissed.

71-200

4 I.A.3 470

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On April 5, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 71-200

FILED

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAR 3 - 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
WILLIAM C. REINBOLD,
Defendant-Appellant.

Appeal from the Circuit Court of Kane County, Illinois.

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, age 17, was indicted for attempt murder, and armed robbery in one indictment, alleged to have occurred on April 1, 1970; and in a second indictment, for burglary and theft over $150, both alleged to have occurred on March 5, 1970.

Defendant was found competent to stand trial in a hearing held pursuant to Ill.Rev.Stat. 1969, ch.38,par.104-1. Represented by the public defender, defendant pleaded guilty to the lesser included offense of aggravated battery in the first indictment, and to the charge of burglary in the second indictment. The remaining charges were nolle prossed. He was sentenced to 3 - 10 years on each offense to run concurrently. We allowed a late notice of appeal and appointed counsel from the Illinois Defender Project who now asks leave to withdraw.

The motion to withdraw is granted. From our examination of the record, we agree that the appeal is wholly frivolous and without merit. We agree with counsel that the indictments are

sufficient; that the defendant was competent to plead guilty; and that he was properly admonished. Further, considering that the victim was stabbed forty-five times, requiring 165 stitches, was beaten on her head with a rock, and defendant's prior record included previous batteris as a juvenile, the sentence cannot be considered excessive.

The judgment below is affirmed.

LEAVE TO WITHDRAW AS COUNSEL
GRANTED, AND JUDGMENT AFFIRMED.

4 I.A.3 476

71-127 STATE OF ILLINOIS

GENERAL ELECTRIC CO. VS BURT JENNINGS

ABST.

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy-two, within and for the Third District of Illinois:

Present—

*HONORABLE ALLAN L. STOUDER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on MARCH 24, 1972 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 71-127

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1972

GENERAL ELECTRIC COMPANY, Plaintiff-Appellant,	)	Appeal from the Circuit Court, LaSalle County
vs.	)	
BURT JENNINGS, d/b/a TONICA HARDWARE,	)	Honorable John J. Clinch, Jr. Judge Presiding
Defendant-Appellant	)	Abstract

MR. PRESIDING JUSTICE STOUDER delivered the opinion of the court:

Plaintiff-Appellant, General Electric Company, filed a small claims complaint in the Circuit Court of LaSalle County seeking to recover $319.24 from the defendant Burt Jennings, d/b/a Tonica Hardware. The defendant was duly notified of the action and on March 17, 1971, judgment was entered by default against defendant. In aid of collection of the judgment the plaintiff commenced citation proceedings on April 28, 1971, requiring the defendant to appear with his books and records on May 14, 1971. At the request of plaintiff hearing was continued until June 18, 1971.

On June 18, 1971, defendant appeared for the first time with his attorney and moved to vacate the default judgment of March 17, 1971 and for leave to answer plaintiff's claim which motion was granted. Plaintiff has appealed the order vacating such judgment arguing that the court was without authority to enter such order. The defendant has filed no brief in this appeal.

From the foregoing facts it appears that the motion seeking to vacate the default judgment was not filed until more than three months had elapsed from the date of the default judgment. Accordingly if the defendant was entitled to relief

he was so entitled only if he complied with the provisions of Section 72, Chap. 110, Ill. Rev. State, 1969. We have examined defendant's motion and agree with appellant that it fails to disclose any explanation, reason or excuse for defendant's failure to appear or otherwise oppose plaintiff's claim prior to the entry of the default judgment. Defendant's affidavit suggests that a controversy existed with regard to the quality of the merchandise supplied but is utterly silent as to why defendant had failed to appear or respond for nearly four and a half months after the action was originally commenced. The motion itself makes a passing illusion to ill health but fails to suggest any reason for defendant's conduct. By necessary implication the motion concedes the defendant had proper notice of the pendency of the action and the date that he was required to appear. Under such circumstances the motion and affidavit were insufficient to support any relief under Sec. 72. Brockmeyer v. Duncan, 18 Ill. 2d 502, 165 N. E. 2d 294. For the foregoing reasons the order of the Circuit Court of LaSalle County vacating the judgment is reversed and remanded with directions that the judgment be reinstated.

JUDGMENT REVERSED AND REMANDED
WITH DIRECTIONS.

Alloy, J. and
Scott, J. concur.

1/31/72

14 I.A.3 601

55143

GENEVIEVE FELCYN, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
BETTY TIMMINS, et al., Defendant-Appellant.	)	HON. RICHARD A. HAREWOOD, Presiding.

CHICAGO BAR ASSOCIATION

ABST.

MR. JUSTICE BURKE delivered the opinion of the court:

On November 16, 1966, Genevieve Felcyn filed a complaint seeking damages for injuries sustained as the result of an automobile collision. Plaintiff was a guest in an automobile operated by Betty Timmins, the defendant, which was struck by an automobile operated by Paul Schwartz.

At the conclusion of a bench trial the court found defendant guilty of wilful and wanton misconduct and entered a judgment for $4,450. The defendant appeals.

On June 15, 1966, defendant operated her automobile in a westerly direction on Le Moyne Avenue approaching its intersection with Laramie in Chicago. With the defendant were her guests, Genevieve Felcyn, Ateline Damato, and Dorothy Jensen.

Defendant was driving her guests home from work. It was raining. According to plaintiff and Mrs. Damato, as defendant's car approached Laramie, she decreased the rate of speed but did not come to a complete stop. At that intersection a stop sign controls the westbound flow of traffic. There were no controls at the intersection regulating the traffic moving on Laramie, a north-south highway.

Ateline Damato testified that when defendant's car entered the intersection she observed an approaching vehicle traveling in a southerly direction on Laramie. She first observed that vehicle as the front portion of the car in which she was riding passed the

stop sign. Mrs. Damato stated that when she first noticed the other vehicle it was three or four car lengths away. Plaintiff testified that she also observed the approaching vehicle and estimated it to be approximately five car lengths away. Plaintiff stated that upon seeing the oncoming car, one of the passengers in her vehicle exclaimed: "Look out," and another: "Oh." Plaintiff said that she called out the name "Betty."

Both plaintiff and Mrs. Damato stated that after the passengers called out their warnings, Mrs. Timmins accelerated the speed of her car through the intersection. When her vehicle traversed the southbound lane of Laramie, the vehicle traveling in a southerly direction on Laramie, struck the rear portion of defendant's car. Plaintiff testified that immediately prior to the occurrence there were no other cars approaching the intersection in the southbound lane of traffic.

Mrs. Timmins testified that as her car approached the intersection she came to a complete stop, waited about ten seconds and looked to her left and right. She observed a vehicle standing in the southbound lane on Laramie and that it had its left turn signal on. According to this witness, the driver of the car motioned to her with his arm to proceed across the intersection. When defendant's car reached the west side of Laramie, another vehicle struck the right rear portion of her car.

The only contention raised by the defendant on appeal is that her conduct was not wilful or wanton in nature. We do not agree.

In Schneiderman v. Interstate Tr. Lines, 394 Ill. 569 at 583, the court, in dealing with the subject wilful and wanton conduct, said:

> "A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care."

Whether or not a defendant has been guilty of consciously disregarding the safety of others presents an issue of fact dependent upon the circumstances of each case. Brown v. Illinois Terminal Co., 319 Ill. 326; Ritter v. Nieman, 329 Ill.App.163 and Gaiennie v. Fringer, 5 Ill.App.2d 403. In the case at bar there was ample evidence from which the trial judge could conclude that the defendant consciously disregarded the safety of her guests. Both plaintiff and Mrs. Damato testified that the defendant drove her car without observing the requirement to stop, failed to observe the oncoming vehicle, disregarded the warnings of her passengers and accelerated the speed of her car across the path of the oncoming southbound car. Under these facts and circumstances we cannot say as a matter of law that the actions of the defendant in operating her car did not constitute wilful and wanton misconduct within the meaning and intent of the "guest statute."

Whether the collision occurred in the manner described by the plaintiff and Mrs. Damato or in the manner described by the defendant presented a question of fact dependent upon the credibility of the witnesses and the weight to be accorded their testimony. See Schulenburg v. Signatrol, Inc., 37 Ill.2d 352.

Although the testimony was conflicting we cannot say that the judgment is against the manifest weight of the evidence.

Therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

4 I.A.3 656

55624

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ROBERT P. JOHNSON, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

HON. KENNETH E. WILSON, Presiding.

CHICAGO BAR ASSOCIATION

ABST.

MR. JUSTICE BURKE delivered the opinion of the court:

A jury found Robert P. Johnson guilty of burglary as charged. He appeals from the judgment thereon sentencing him to a term of not less than four nor more than ten years in the penitentiary.

At approximately 10:30 P.M., on the 5th of December 1969, Officers Charles Fitzpatrick and Edmund Rosiaic were patrolling in their squad car when they received a radio message advising that a burglary was in progress in the vicinity of 82nd and Cottage Grove Avenue, Chicago. Upon arriving at Alexander's Men's Clothing Store, at 8233 South Cottage Grove, they proceeded to the rear of the building and observed the defendant on the roof. According to both officers the defendant fled when exposed by their spotlight. The defendant jumped off the roof, landed in front of Officer Fitzpatrick and was placed under arrest. When the officers examined the roof of the store, they observed a large hole in the roof and a quantity of burglary tools and twenty men's suits.

Wilson Alexander testified that on the evening of the occurrence he was the owner of Alexander's Men's Store, and that about 11:30 P.M., he was requested to appear at the Fifth District Police Headquarters in connection with the burglary of his store. Alexander testified that on arriving at the police station, he said to the defendant, ". . . why did they pick on me? I had been hit quite a bit before." Both the State's Attorney and the defendant's attorney

agreed that that answer was unresponsive and therefore, objectionable. The trial judge ruled that the answer was objectionable but refused to grant a mistrial. The trial judge instructed the jury to disregard the statement.

The State's Attorney then propounded the following question to Mr. Alexander:

Mr. Goldberg: Q. "Mr. Alexander, just limiting yourself to the precise words that you said and any response—what response, if any, the defendant made, use precise words, what were those words?"

A. "The precise wording was 'Why did you hit me?' The defendant responded 'I did not know it was a black owned store.' Those were his actual words."

When the defendant was called to testify he stated that at the time of his arrest he was on his way to purchase a package of cigarettes. He denied that he burglarized the store. He testified that from 1955 to 1961, he had been known by the name Robert Wakefield. At the conclusion of the defendant's testimony, the prosecution introduced certified records of two prior burglary convictions of Robert Wakefield. The trial judge admitted these documents but instructed the jury to consider them only for the purpose of impeachment.

Defendant's attorney in his closing argument to the jury contrasted the defendant's pleas of guilty to the prior charges of burglary to his plea of not guilty in the case at bar wherein the defendant is "in fact not guilty." In response, the state's attorney said:

> "Well the defendant pled guilty to the last two burglaries, and because he asked for a jury trial on this one, that means he wasn't guilty. I have no idea why the defendant in this case or any other case does or does not plead guilty, or does or does not ask for a jury trial. Maybe he got tired of going to the penitentiary.

Mr. Bloom [attorney for defendant]: Objection.

The Court: Sustained.

Mr. Goldberg [ass't state's att'y]: Maybe he should have gotten tired of committing burglaries.

Mr. Bloom: Same objection, your Honor.

The Court: Sustained."

* * *

"Mr. Goldberg: It was a fantastic coincidence that this man was picked out of all the men to be charged with the burglary because he happened to be walking down the street. What a fantastic coincidence that he had been twice convicted of a burglary."

* * *

"Mr. Goldberg: And yet out of all these people, Officer Fitzpatrick just happened to have the good fortune to pick on a twice convicted burglar to pin this burglary charge."

Defendant contends that the People improperly attempted to prove his guilt by his prior convictions and that the testimony of Alexander, relating to the prior burglaries of his store prejudiced him before the jury.

The credibility of a witness may be impeached by introducing certified records of that witness' prior felony convictions. People v. Lacey, 24 Ill.2d 607. In the case at bar there is no indication that the records of prior convictions were introduced for any purpose other than impeachment. The trial judge cautioned the jury to consider the prior convictions for impeachment. Although the comments of the State's Attorney might, under other circumstances, be deemed to constitute improper conduct, we conclude that under the situation presented, these remarks were invited by the defendant's attorney. People v. Woodly, 57 Ill.App.2d 380.

Regarding Mr. Alexander's testimony relating to the prior burglaries of his store, the record indicates that the answer was unresponsive. The objection to this statement was sustained and the jury was instructed to disregard it. The prompt ruling of the trial judge coupled with his admonition to disregard the answer cured the harmful effect of the volunteered answer. See People v. Galloway, 28 Ill.2d 355.

The judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

14 I.A.3 657

ABST.

56162

RUBY GOODE, Plaintiff-Appellant, vs. THOMAS GOODE, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Sydney R. Jones, Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

On November 13, 1970, a decree of divorce was entered in favor of defendant, Thomas Goode, on his counterclaim. Plaintiff, Ruby Goode, did not appear at the hearing and was not represented by counsel. On February 8, 1971, plaintiff filed a verified petition to vacate the decree. Ill.Rev.Stat. 1969, ch.110, par.72. Upon denial of this petition, plaintiff appeals.

We are handicapped in disposition of this appeal because no brief has been filed in behalf of defendant. However, we will decide the appeal on its merits. Lynch v. Wolverine Insurance Co., 126 Ill.App.2d 192, 193-194, 261 N.E.2d 466. Factors which have previously impelled us to pro forma disposition are not present here. See Gibraltar Corp. v. Flobudd Antiques, Inc., _____Ill.App.2d_____, 269 N.E.2d 515, leave to appeal denied May 25, 1971, and Drovers National Bank of Chicago v. City of Chicago, _____Ill.App.2d_____, 273 N.E.2d 238.

Plaintiff's verified petition alleged that she had no notice of the hearing and did not learn that the decree for divorce had been entered until approximately 50 days thereafter. The petition, as amended, alleged that the decree was obtained by untrue representations made to the court by counsel for defendant and that plaintiff had a meritorious defense to

defendant's counterclaim. The record shows that the evidence in the case was heard on October 23, 1970. The trial court inquired as to whether plaintiff's counsel had been notified. The attorney for defendant responded affirmatively and stated that plaintiff's attorney of record was about to withdraw. The court then asked defendant's counsel if plaintiff had been "properly notified" and the response was, "Yes."

Since no responsive pleading has been filed to the verified petition to vacate the decree, the well pleaded facts set out in the petition must be taken as true for purposes of this appeal. Muniz v. Wamsley, 127 Ill.App.2d 410, 412, 262 N.E.2d 295. See also Roth v. Roth, 45 Ill.2d 19, 23, 256 N.E.2d 838.

It seems clear that defendant is entitled to relief in accordance with her petition. The two leading cases in Illinois which support this conclusion are Ellman v. De Ruiter, 412 Ill. 285, 106 N.E.2d 350 and Elfman v. Evanston Bus Co., 27 Ill.2d 609, 190 N.E.2d 348. This record shows active misrepresentation to the court by counsel for defendant. If counsel had correctly advised the court that plaintiff had received no notice of the hearing, the decree would not have been entered. See Boughton v. Jones, 98 Ill.App.2d 396, 400, 240 N.E.2d 263. See also Mueller & Sons v. Morris, 128 Ill.App.2d 454, 263 N.E.2d 120.

The authorities dealing with these Section 72 petitions, addressed to the equitable powers of the court, are unanimous in the statement that the prime purpose of such a proceeding is to prevent injustice in accordance with fundamental fairness. Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613, 190 N.E.2d 348.

We will attempt to follow these established principles. The decree granted defendant a divorce on his counterclaim. This record shows that the marriage of these parties lasted

slightly over two months. Both of them are apparently people of mature age. After the decree, defendant remarried his former wife, with whom he had lived for 30 years. A number of children had been born as a result of this marriage. In view of these facts, we are in accord with the astute remark of the experienced trial judge that disturbing this aspect of the decree would cause more harm than good. Those portions of the decree which grant defendant a divorce should remain in full force and effect.

Another portion of the decree terminated the duty of defendant to pay plaintiff support money, alimony or attorney's fees. Without a complete evidentiary hearing it is impossible to say that the short duration of the marriage constitutes sufficient equitable basis for this result. The record shows that plaintiff is blind and lives on social security disability income but there is no other information regarding the financial ability of either party. Consequently, insofar as the petition pertains to those portions of the decree which terminate the duty of defendant to pay support money, alimony or attorney's fees, the denial thereof is reversed so that a complete evidentiary hearing may be held on these matters for a fair and equitable disposition thereof.

The order appealed from denying plaintiff's petition to vacate the decree is reversed and the cause is remanded to the Circuit Court of Cook County for further proceedings not inconsistent with this opinion.

Order reversed and cause remanded with directions.

BURKE, J. and LYONS, J. concur.

4 I.A.3 674

CHICAGO BAR ASSOCIATION

NO. 55187

JACK R. DAVIS and THOMAS T. BURKE, Petitioners-Appellees, vs. ALEXANDER B. MAGNUS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY ——— HONORABLE EDWARD J. EGAN, PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court. ABST.

This appeal is from an order entered in a condemnation proceeding. Appellees Jack R. Davis and Thomas T. Burke, two lawyers, filed a petition in which they alleged that appellant, purchaser of the land being condemned, retained petitioner Davis to represent him and orally agreed that if the award exceeded $1600 per acre, Davis was to receive for his fees a sum equal to one-third (1/3) of the excess. Davis obtained Burke as additional counsel. As a result of their endeavors, it was alleged, the condemnation award was increased to a net amount of $12,888. To secure their fees, petitioners filed an attorney's lien with the Cook County Treasurer who retained $4,293.33, the sum petitioners claimed was due them. Appellant answered the petition, denying all factual allegations, particularly those which alleged that appellant was obligated to them under an oral contract to pay attorney's fees.

The trial judge, without a jury, heard evidence which included exhibits and conflicting testimony of the parties. Thereafter, he entered an order that made findings in favor of petitioners and ordered the County Treasurer to pay them the sum of $4,293.33. Appellant contends that (1), the findings are contrary to the manifest weight of the evidence and (2), it was intended by Burke that the agreement between the parties be reduced to writing. Therefore, appellant argues, there was no contractual relationship between them.

The question whether the parties entered into a contract was an issue of fact. Morris v. Anderson, 121 Ill. App. 2d 169, 259 N.E. 2d 601. On evidence which, though conflicting, supports the findings, we will not substitute our judgment for that of the trial judge. Story v. Hull, 41 Ill. App. 109, affirmed Hull v. Culver, 143 Ill. 506, 32 N.E. 265; Johnson v. Fischer, 108 Ill. App. 2d 433, 247 N.E. 2d 805. Although the parties may have intended that their agreement be reduced to writing, where they assented to all the terms of the agreement, making their intentions clear, absence of a written document will not negative existence of a binding contract. Stephens v. Nixon, 338 Ill. App. 275, 86 N.E. 2d 278. The judgment is affirmed.

Affirmed.

Stamos, P.J. and Schwartz, J., Concur.

Publish abstract only.

54059

4 I.A.3 708

ABST.

RICKY BLACKWELL, a minor, by PAULINE BLACKWELL, his mother and next friend,

Plaintiff-Appellee,

vs.

THE VILLAGE OF STONE PARK,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Joseph H. Wosik, Presiding.

CHICAGO BAR ASSOCIATION

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Ricky Blackwell, a minor, acting by his mother (plaintiff) brought action for personal injuries against Village of Stone Park, a municipal corporation, (Village). After trial by jury, a verdict was returned in favor of plaintiff and judgment was entered on the verdict. The Village appeals, contending only that the trial court erred in denying its motion for leave to file an amended answer.

In his amended complaint, plaintiff alleged that he was riding a bicycle on Lake Street within the Village and that the Village breached its duty of due care by permitting an unsafe pipe or rod to protrude from the pavement. The amended complaint alleged that the Village possessed, maintained and controlled Lake Street at the time in question. In its answer to the amended complaint, the Village admitted this allegation. Close to five years later, on January 24, 1969, the Village retained other counsel. On January 28, 1969, after the case had been assigned for trial, this counsel presented a verified petition in which he sought leave to file instanter an amended answer. The proposed amended answer was tendered with the petition. It denied the allegation of the amended complaint that the Village possessed, maintained and controlled Lake Street.

The verified petition alleged that the State of Illinois possessed and controlled Lake Street at the point in question, where it was known as Route 20. Appended to the petition is a certificate executed by the Village Clerk to the effect that the Village did not operate and control that portion of Lake Street but that it was known as Highway 20 and that it came under the jurisdiction of the State of Illinois, Division of Highways. Also appended to the verified petition is a letter from the Assistant District Engineer of the Department of Public Works and Buildings of the State of Illinois to the effect that this portion of Lake Street is known as U. S. Route No. 20 and that it "***was 100% under the jurisdiction of the State of Illinois."

The right of a litigant to amend his pleadings is set forth in Section 46(1) of the Civil Practice Act. Ill.Rev.Stat. 1969, ch.110, par.46(1). The statute provides that, "At any time before final judgment amendments may be allowed on just and reasonable terms***adding new causes of action or defenses***which may enable***the defendant to make a defense***." As this court has recently held, "[a]n attitude of liberality in the amendment of pleadings is the announced policy of courts of this state***." In re Estate of Gingolph, 114 Ill.App.2d 363, 369, 252 N.E.2d 726. Although it has often been stated and held that the filing of amendments to pleadings is a matter within the discretion of the trial court, it is established that this discretion should be liberally exercised in favor of allowance of amendments whenever essential to proper presentation of a party's cause of action or defense. Adler v. Northern Illinois Gas Co., 57 Ill.App.2d 210, 219-220, 206 N.E.2d 816. The test to be applied in determining whether the discretion of the court was properly exercised is whether the order entered by the court furthered the ends of

justice. Bowman v. County of Lake, 29 Ill.2d 268, 281, 193 N.E.2d 833.

A case similar to the one at bar is Arendt v. McClerren, 74 Ill.App.2d 279, 220 N.E.2d 254. The issue there was whether the person who gave plaintiffs a warranty was actually an agent of the defendant. In a verified answer, defendant had admitted that this person was his agent. During trial and while defendant was presenting his evidence, he moved the court for leave to amend the answer as to deny that this person was his agent. This court held that the amendment should have been permitted and that plaintiff should have been given an opportunity to offer additional evidence on the issue of agency.

Applying these principles to the case at bar, we conclude that the judgment appealed from should be reversed and the cause remanded for further proceedings. The petition tendered by defendant made a strong showing as to the truth of the allegation in the proposed amended answer that the state was actually in charge and possession of the roadway. It would have done no harm to either party to permit this amendment and the facts could then readily have been ascertained. We note here that this action would not have prejudiced plaintiff since there is actually pending in the Illinois Court of Claims an action by plaintiff against the State of Illinois wherein plaintiff seeks recovery for his injuries. We need not consider in this opinion the question raised in the briefs of both parties as to whether the Village should be estopped by the allegations made in its original answer.

Accordingly, the judgment appealed from is reversed and the cause is remanded to the Circuit Court of Cook County with directions to permit filing of the amended answer.

Judgment reversed and cause
remanded with directions.

BURKE, J. and LYONS, J. concur.

4 I.A.3 709

ABST.

54668)
54670)

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

MARY L. HALL and
TOMMIE GREENFIELD,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Mel R. Jiganti, Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, defendants, Mary L. Hall and Tommie Greenfield, were found guilty of murder. They were sentenced respectively to penitentiary terms of 14 years to 14 years and one day, and 14 years to 17 years. Their appeals to this court have been consolidated for hearing. The only contention raised by defendants is that the evidence was not sufficient to prove guilt beyond a reasonable doubt. No legal errors are cited and none appear.

All of the evidence of guilt was circumstantial. The proof of circumstances must be of a conclusive nature and tendency leading, as a whole, to a satisfactorily reasonable and moral certainty that the accused and no one else committed the crime. People v. Marino, 44 Ill.2d 562, 580, 256 N.E.2d 770 citing People v. Bernette, 30 Ill.2d 359, 367, 197 N.E.2d 436 and other authorities. However, guilt need not be proved beyond any possibility of doubt. People v. Murdock, 48 Ill.2d 362, 367, 368, 270 N.E.2d 21.

The evidence shows that defendants lived together in a hotel or apartment building. On November 2, 1968, sometime after midnight, a neighbor who lived next door testified that he heard

loud bumping noises from their apartment. About 2:30 a.m., the witness left the building; and, upon his return, he saw both defendants, accompanied by a Negro man and a Caucasian girl, dragging a body out of the building. He remonstrated with them and they accordingly picked up the person by the legs and arms and continued on. A bloody trail remained which defendant Mary Hall and the girl later washed off from the stairs and wall. This witness identified the body as that of the deceased by means of a photograph. Later that morning, the witness saw the body in a vacant area under the elevated tracks close to the building.

Another witness, who looked out of a window across the street with opera glasses, observed two girls in light coats examining an object on the sidewalk. The girls returned to the building and two men then dragged the object about 30 feet into the vacant area beneath the elevated structure. The witness recognized the object as a body. The men returned to the building. One of them came out, carried something like a blanket or a big cloth to the body and reentered the building. The two couples then left the building together. The witness continued to watch the area until dawn and saw no other persons in the vicinity. He then went down and saw the body with feet protruding from a blanket. He "saw the police coming" and alerted them.

Defendants both testified in their own behalf. Mary Hall testified that another couple, a Negro man and Caucasian girl, had visited them that evening. She also testified that when all had been in the apartment about 10 minutes, the deceased entered. He was then in normal condition. She testified that he left shortly to buy some liquor and returned in about 45 minutes. He was then bleeding profusely from a cut over his eye, which he

said, according to the testimony, he had received from being beaten by persons unknown. Both defendants testified that the two couples were attempting to escort him to the hospital, which he had declined, when he fell down the flight of stairs. However, he then left and walked away all alone in the direction of the vacant area where the body was later found by the police. Both defendants thus denied their guilt.

In this court, defendants attack credibility of their neighbor on the ground that he was twice previously convicted of armed robbery. However, the record shows that the testimony of this witness is corroborated by the apparently credible testimony of the man with the opera glasses. The testimony regarding removal of blood stains from wall and stairs by defendant Mary Hall was corroborated by their neighbor. The testimony concerning bumping noises in the apartment of the defendants comports logically with the probability of a beating of the deceased.

In addition, most important of all, an expert pathologist testified that deceased had suffered blows to forehead, face and neck. His head was cut and bruised. The expert stated that the cause of death was asphyxiation from a fracture of the larynx administered by a blow of the hand similar to a karate chop rather than by an implement. The testimony was that death necessarily occurred abruptly after infliction of this injury. This testimony effectively destroys the testimony of defendants that the deceased fell down stairs then got to his feet and walked away, alone, toward the vacant area.

We have carefully considered all of the arguments advanced by counsel for defendants, in their brief and orally. Without exception, all of them pertain to slight inconsistencies which we cannot elevate "***to the status of a reasonable doubt."

People v. Huff, 29 Ill.2d 315, 320, 194 N.E.2d 230. See also People v. Stoafer, 112 Ill.App.2d 198, 203, 251 N.E.2d 108.

Both findings of guilt entered by the trial judge satisfied the required quantum of proof by circumstantial evidence. A determination of sufficiency of the proof here rested upon the credibility of the witnesses. The evidence supports the findings of the trial judge that each of the defendants is guilty beyond a reasonable doubt. See People v. Murdock, 48 Ill.2d 362, ____N.E.2d____; People v. May, 46 Ill.2d 120, 262 N.E.2d 908. Accordingly the judgments of the Circuit Court of Cook County are affirmed as to each defendant.

Judgments affirmed.

BURKE, J. and LYONS, J. concur.

4 I.A.3 723
CHICAGO BAR ASSOCIATION
ABST.

55462

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JERRY WALLS, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE FRANK J. WILSON, PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

Defendant has appealed from a finding that he violated probation. He presents two issues: (1) Whether the trial judge improperly denied defense counsel's request for a continuance, and (2) Whether the trial judge relied upon improper criteria in determining sentence.

On September 11, 1967, defendant was indicted for aggravated battery in violation of Ill. Rev. Stat. 1965, ch. 38, par. 12-4. He subsequently entered a plea of guilty and, on December 6, 1967, was placed on probation for five years with the first year to be served in the House of Correction. On October 3, 1969, the Probation Department reported that defendant was to appear on October 14, 1969, to answer charges of mob action, aggravated assault, possession of weapon, failure to register a gun and disorderly conduct. A warrant for violation of probation issued the same day and defendant posted bond on October 7, 1969. Defense counsel [Public Defender] entered his appearance on February 17, 1970, and on February 18th a rule to show cause why probation should not be terminated was issued. The matter was then continued numerous times as follows: to February 20th on State motion; to February 24th on defense motion; to February 27th on defense motion; to March 4th on defense motion; to March 13th by agreement; to April 2d by agreement; to May 20th on defense motion; to June 10th on defense motion; to June 29th by order of court; and, to July 2d on State motion.

On July 2, 1970, after denying a defense motion for further continuance, the court conducted a full hearing on the rule to show cause. Evidence taken during the hearing established that on September 25, 1969, at approximately 12:30 P.M., about three thousand construction workers were gathered near the Customs House at Harrison and Canal Streets, Chicago. The workers were there to testify, if necessary, at a hearing concerning job discrimination in the building trades. A small group of Negroes, including defendant, were pushing through the crowd, apparently attempting to reach the doors of the Customs House. The group pushed two construction workers aside and defendant attempted to walk further into the crowd. Defendant was pushed back by a construction worker and, as he went back, he drew a weapon. He aimed the gun at the crowd whereupon a construction worker deflected his arm. The gun was then fired into the air four times. Fighting then ensued and, according to the arresting officer, "When I finally broke through the crowd, I observed the defendant lying on the ground with several people on top of him, civilians and policemen, fighting with him and fighting over him." Defendant was taken into custody and was transported to the police station.

Following the hearing on the rule to show cause, the court entered a finding that defendant had violated his probation. A hearing in mitigation and aggravation was conducted one week later during which the State recommended a four to ten year sentence and the defense an extension of probation. The court, however, sentenced defendant to not less than three nor more than nine years in the penitentiary.

For his first contention, defendant argues that he was denied due process of law because the trial judge denied a defense motion for continuance at the start of the hearing. The record

discloses that defense counsel did move for a continuance because he allegedly had not had time to prepare a defense. The trial judge reminded him that he had demanded trial just two days earlier, an action which had forced the State to request a continuance, and then denied the motion for continuance. We find no evidence of impropriety in this ruling by the trial judge. As stated by our Supreme Court in People v. Canaday, 1971, 49 Ill.2d 416, 427:

> The granting of a continuance to permit preparation for a case, or for the substitution of counsel, necessarily depends upon the particular facts and circumstances surrounding the request, and is a matter resting within the sound judicial discretion of the trial court. [Citations.] Too, it cannot be said that a motion for continuance has been improperly denied, unless it appears that the refusal to grant additional time has in some way embarrassed the accused in the preparation of his defense and thereby prejudiced him. [Citation.]

Here, defense counsel entered his appearance on February 17, 1970, almost five months prior to the hearing. The matter was continued no less than five times on defense motion, and defense counsel demanded immediate trial on June 29, 1970, two days prior to the date of the hearing. During the hearing, defense counsel appeared to be thoroughly prepared and conducted his representation, in the face of overwhelming evidence against the defendant, with diligence and skill. Under these circumstances, we cannot say that the defendant was prejudiced to a degree which requires us to substitute our judgment for that of the trial judge.

Defendant next contends that the trial judge improperly considered matters outside those surrounding the offense for which he was to be sentenced, i.e., the aggravated battery conviction of December 6, 1967. We have carefully reviewed the entire record taken during defendant's hearing in mitigation and aggravation and find no evidence whatsoever to support defendant's contention. Indeed, the trial judge expressly stated that he was concerned only

with facts related to the "original matter [which] is the only matter that is here."

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.

71-164

14 I.A.3 778

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Acting Presiding Justice
Honorable JOHN A. KRAUSE, Justice
Honorable ALFRED E. WOODWARD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On April 11, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-164

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN P. HENNEN, Plaintiff-Appellant, vs. GEORGE C. TRUEMPER, Chairman, et al., Defendants-Appellees.	)	Appeal from the Circuit Court, Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This matter was commenced on February 13, 1970, when the plaintiff filed his complaint for mandamus brought against the Chief of Police, the City Treasurer and members of the Civil Service Commission of the City of Aurora. The defendants moved to dismiss the complaint on the grounds that the plaintiff had failed to exhaust his administrative remedies under the Administrative Review Act. The court, on March 26, 1971, granted the motion and dismissed the complaint. This appeal followed.

The complaint alleged that the plaintiff, John P. Hennen, was certified and appointed to the office of patrolman in the classified civil service of the police department of the City of Aurora on September 1, 1949, and that he thereafter performed the duties of that position until December 1, 1966. On the latter date, Hennen was certified and promoted to the office of sergeant after he had passed the requisite examination. On April 3, 1968, Hennen was suspended by the Chief of Police for a period of 19 days and he requested a hearing before the Civil Service Commission relative to the propriety of that suspension.

After the hearing (characterized as "pretended" in the complaint), the commission issued an order upholding the suspension and making the following additional orders:

> "2. On August 1, 1968, Mr. Hennen is to be returned to the rank of Sergeant for a period of fourteen (14) months or until September 30, 1969.
>
> 3. During this period 8/1/68 to 9/30/69 he is to be used in an area where he will exercise no command over or supervision of patrolmen.
>
> 4. On October 1, 1969, he is to be demoted to the permanent rank of Patrolman.
>
> 5. If at any future date Mr. Hennen again is guilty of conduct unbecoming an officer, he is to be immediately suspended for an indefinite period and charges preferred to the Civil Service Commission for his dismissal."

The complaint further alleged that Hennen, pursuant to this order, was not restored to the rank of sergeant until August 1, 1968, and that he was thereafter notified by the Chief by letter dated September 23, 1969, that as of October 1, 1969, he was demoted

from sergeant to the permanent rank of patrolman. On October 29, Hennen made a written demand on the Civil Service Commission to take all necessary steps to "nullify" his demotion and reinstate him to the rank of sergeant. On November 26, he was notified by the commission that his demand had been reviewed but that no further action would be taken.

The complaint sought a writ of mandamus commanding the defendants to take all necessary steps to have the demotion order "nullified, cancelled and expunged from the records..."; to immediately restore him to the permanent rank of sergeant; and to pay him for the salary differential between the ranks of patrolman and sergeant for the periods between April 23, 1968, to August 1, 1968, and after October 1, 1969, during which he had received a patrolman's pay.

Section 10-1-45 of the Municipal Code (Ill. Rev. Stat. 1969, ch. 24, sec. 10-1-45) provides as follows:

> "The provisions of the 'Administrative Review Act' ....shall apply to and govern all proceedings for the judicial review of final administrative decisions of a Civil Service Commission...."

The Administrative Review Act, adopted in Illinois in May, 1945, provides in Section 265 (Ill. Rev. Stat. 1969, ch. 110, sec. 265) that

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law made of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof...."

The Administrative Review Act was created to furnish a uniform method for the judicial review of the decisions of most of the administrative agencies of the State. Moline Tool Co. v. Dept. of Revenue, 410 Ill. 35, 37. Our Supreme Court considered the effect of the Act on the use of mandamus suits to review administrative decisions in the case of People ex rel. Chicago N.W.R.R. vs. Hulman. (31 Ill. 2d 163). In that case the railroad sought mandamus to compel reassessment of its properties by the Department of Revenue. The court held that mandamus was improper and stated as follows:

> "As was noted in Moline Tool Co. v. Department of Revenue... the Administrative Review Act....was designed to provide a single uniform method by which administrative decisions of State governmental agencies could be reviewed, and, since our decision in that case, it has become firmly established that where an act creating or conferring power on an administrative agency expressly designates that judicial review will be accomplished under the Administrative Review Act, the employment of pre-existing methods of securing judicial review is prohibited."

Since that case, the reported decisions have consistently barred the use of mandamus to review the decisions of those administrative agencies covered by the Act. People ex rel. Ryan v. Civil Service Commission, 117 Ill. App. 2d 50, 253 N.E. 2d 913, 916; People ex rel Dever v. Wilson, 107 Ill. App. 2d 223, 246 NE. 2d 863, 865; People ex rel Goldfarb v. White, 54 Ill. App. 2d 483, 491.

The plaintiff here contends, however, that he does not seek to review the decision of the Civil Service Commission but only

to compel the municipal authorities to perform those acts that by law they are required to perform. He maintains that the Chief of Police had no lawful authority to demote him to patrolman since the order of the Civil Service Commission, so far as it went beyond an affirmation of his original 19 day suspension, was patently void and of no legal consequence whatsoever. He admits that this procedure amounts to at least an indirect review of the commission's order but argues that a void order can be collaterally attacked at any time.

Section 10-1-18 of the Municipal Code (Ill. Rev. Stat. 1969, ch. 24, sec. 10-1-18) provides, in part, as follows:

"10-1-18. REMOVAL-SUSPENSION-RETIREMENT.

> Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the civil service commission, or by or before some officer or board appointed by the commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by the commission, shall be certified to the appointing officer, and shall forthwith be enforced by such officer. Nothing in this Division 1 shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 7 days or suspended within 6 months after a previous suspension, shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension.."

Since, the plaintiff argues, the jurisdiction of the commission was invoked only to consider the propriety of his suspension, it

had no authority to enter the additional orders relative to his demotion. In any event, he further maintains, the commission had no authority either to demote him or regulate his conduct in the performance of his duties.

The closest case to this precise point is the People ex rel. Fike v. Slaughter (31 Ill. App. 2d 175). In that case, the board of fire and police commissioners of the Village of Dolton removed the name of Charles Fike from the register of eligible candidates for appointment as a police officer. It was alleged that this action took place after an informal meeting between Fike and the commissioners and that no written charges had been served upon him nor was he permitted the opportunity to be heard in his own defense. Fike maintained that, under these circumstances, the board had no jurisdiction to enter the order of removal and sought through mandamus to compel his appointment as patrolman since that order was "null and void." The Appellate Court held, nonetheless, that the order of removal should have been reviewed under the Administrative Review Act and that the issuance of a writ of mandamus by the trial court was improper.

The plaintiff cites a decision of this court as authority for the proposition that mandamus was proper in this case. In that decision, People ex rel. Stone v. Wilson (III Ill. App. 2d 101, 248 N.E. 2d 826), we upheld a denial of a petition for a writ of mandamus where it appeared that the only remedy for the plaintiff was under the Administrative Review Act even though that defense

had not been raised in the trial court. The plaintiff calls our attention to that portion of our opinion wherein we stated:

> "This opinion is limited to the consideration of situations where a party is seeking judicial review of the merits of an administrative decision. In that circumstance mandamus and other remedies have been prohibited. We distinguish, however, cases such as an action to contest the constitutionality of the Administrative Review Act itself, or an action to prevent irreparable injury where it is alleged the Act does not provide an adequate remedy."

We cannot agree that the order of the civil service commission shows, on its face, that their jurisdiction was limited to the consideration of the propriety of the suspension of the plaintiff. The commission clearly had the authority to consider, under proper circumstances, his removal or discharge. Although it is true that the authority of a civil service commission to demote an employee is questionable, the obvious remedy was review under the Administrative Review Act. Had that remedy been utilized, the entire record of the proceeding before the commission would have been available to the trial court pursuant to sections 272 and 274 of the Act. (Ill. Rev. Stat. 1969, ch. 110, secs. 272 and 274).

We also do not see how the language quoted from our opinion in the Stone case is helpful to the plaintiff since he did not, in his complaint, contest the constitutionality of the Act or allege injury that the Act could not, if utilized, have remedied.

We conclude that the plaintiff's remedy was under the Act and, failing to use the relief available to him there, he was

not entitled to mandamus. The order of the trial court, was therefore, proper and should be affirmed.

AFFIRMED.

KRAUSE AND WOODWARD, J. J., Concur.

I.A.3 797

71-217

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On April 14, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-217

PUBL. IN FULL

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED

APR 14 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	Appeal from the 19th
Plaintiff-Appellee	)	Judicial Circuit
	)	
-vs-	)	Hon. Harry D. Strouse Jr.
	)	Judge presiding
JOHN DAVID YOUNG	)	
	)	
Defendant-Appellant	)	

MR. JUSTICE GUILD delivered the opinion of the court:

Defendant was indicted for the offense of burglary. Upon a negotiated plea, he was found guilty of attempt to commit burglary. Application for probation was made and probation was denied, it appearing that he had been convicted of a number of offenses, had served seven out of the last twelve years in state penal institutions, and that the present offense was committed within a month or so after his release from his last period of confinement. He was sentenced to 2-12 years in the penitentiary.

The Illinois Defender Project appointed to represent him on appeal, has filed a motion to withdraw. We hereby allow counsel's motion to withdraw. From a careful examination of the record, we agree that the appeal is wholly frivolous and without merit.

The court's admonitions to the defendant were in complete compliance with Supreme Court Rule 402. The court determined that the plea was voluntary, determined the factual basis for the charge, and well informed the defendant of the maximum and minimum sentence that might be imposed upon his plea of guilty. The defendant acknowledged his guilt in open court. In summary, no error, harmless or otherwise occurred in the trial court in connection with any aspect of Supreme Court Rule 402. The judgment of the trial court is affirmed.

AFFIRMED.

P.J.SEIDENFELD and J. ABRAHAMSON Concur.

4 I.A.3 986

56034

CHICAGO BAR ASSOCIATION ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAVELL N. DAVIS (otherwise called LAVELL NELSON), Defendant-Appellant.	Appeal from the Circuit Court of Cook County. Kenneth Wilson, AJ.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Lavell Davis was indicted for murder, pleaded guilty to voluntary manslaughter and was placed on probation for five years. Ten months later he was charged with the unlawful use of a weapon, pleaded guilty and was committed to the County Jail for six months. Because of the latter conviction his probation was revoked and he was sentenced to the penitentiary for two to four years.

Davis was advised that he had a right to appeal and the Public Defender was appointed to represent him. His appointed counsel has moved to withdraw and, in accordance with Anders v. California, 386 U.S. 738 (1967), has filed a brief which states that the only possible basis for an appeal would be whether Davis was denied due process of law at the probation violation hearing. The brief concludes that the hearing was properly conducted.

The defendant was notified of his counsel's motion and given a copy of the brief. He was informed by this court that he could file additional points in support of his appeal and a supple-

mental brief has been received from him. In this brief he states that he pled guilty to the offense of unlawfully using a weapon upon the representation of his attorney, an assistant Public Defender, that a deal had been made with the State's Attorney under which the State would see to it that the probation would not be considered violated if he pled guilty.

We have reviewed the record and are of the opinion that the hearing on revocation of probation was fair to the defendant and in accord with due process. A rule to show cause was served upon him; he was informed of the alleged violation; he was present in court; he was represented by counsel, and was proved guilty of violating the terms of his probation by having committed a criminal offense. His present assertion, concerning the representation made to him before he pleaded guilty to the charge of unlawfully using a weapon, was not made at the hearing and is not supported by the record.

The Public Defender's request for leave to withdraw as the defendant's attorney is granted, the appeal is dismissed and the judgment affirmed.

Appeal dismissed;
judgment affirmed.

McGloon, PJ., and McNamara, J., concur.

4 I.A.3 1002

51349

ABST.
CHICAGO BAR ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
	COOK COUNTY.
DENNIE MADDOX (Impleaded), Defendant-Appellant.)	HON. EDWARD E. PLUSDRAK, Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Dennie Maddox (hereinafter "defendant") and Warren Smith were found guilty at a jury trial of the crime of murder; each was sentenced to a term of one hundred years to one hundred ninety-nine years in the penitentiary. Defendant appeals, contending that a pretrial show-up and a pretrial line-up before witnesses to the crime was so unnecessarily suggestive and so conducive to irreparable mistaken identification that he was denied due process of law, and that his motion for a trial separate from Warren Smith was improperly denied. (Warren Smith is not involved in this appeal. See People v. Smith, ____Ill.App.3d____(1st Dist.,Gen.No. 51350, Apr.10, 1972.))

Jules Schlegman on May 21, 1965 owned and operated a tavern at 3048 East 92nd Street in Chicago. He testified that shortly before 7:00 A.M. on that date he had parked his automobile in his parking lot situated off an east-west alley behind his place of business and was walking south along Houston Avenue toward 92nd Street when he observed two men turn the corner of 92nd Street and Houston Avenue and proceed northerly along Houston Avenue. Both men, identified by the witness at trial as the defendant and Warren Smith, were dressed in coveralls. The witness testified that he proceeded to his place of business and that he opened the doors to the public at 7:00 A.M.

Schlegman testified that shortly after 7:00 A.M. the defendant

and Smith entered the tavern and remained several minutes. The two men then left the premises and returned about 7:25 A.M., Smith armed with a sawed-off shotgun and the defendant armed with a revolver. At that time there were twelve or thirteen patrons in the tavern. The witness, who was in the office of the establishment cashing a patron's check, activated a central alarm switch, was ordered by the man identified as the defendant into the tavern proper and then into a washroom at the rear of the tavern. After the witness and several patrons were ordered into, and had entered the washroom, Schlegman heard a shot emanate from the shotgun and observed one of his customers, Clemente Rubio, fall to the washroom floor on his face. The witness and the others remained in the washroom about five minutes, after which a voice was heard from the tavern, calling, "Is anyone home?" Schlegman thereafter discovered that about $450 had been taken from his cash drawer.

Mr. Schlegman was asked at trial whether the defendant was returned to the tavern by the police after the incident and he stated that he was not certain because he was so overcome with emotion that he "couldn't see straight." He stated that he was in tears. The witness thereafter identified the defendant as one of the holdup men in a line-up conducted at police headquarters.

Several other persons in the tavern at the time of the holdup testified at trial that they were employed as steelworkers at two nearby steel plants and that they had just finished working the 11:00 P.M. to 7:00 A.M. shift. They entered the tavern to have checks cashed and to have something to eat and drink.

Darlan Gordon testified that while the defendant and Smith were in the tavern prior to the holdup, the witness placed money into the juke box to play music. The defendant was standing near the

juke box at the time, and the witness spoke to the defendant because he thought the defendant also wished to play the machine, the witness commenting to defendant that he (the witness) still had two songs to select from the machine. Gordon identified defendant at trial as the assailant who later held the revolver during the holdup.

Louis Simmons testified that he was playing pool on a pool table in the establishment and that when he commenced the game the defendant told him where the pool cues were located. He testified that he spoke casually to the defendant concerning the game, and that on one occasion he requested the defendant to move because the defendant was standing in the way of the witness' pool cue in the course of a shot. Simmons identified the defendant at trial as the assailant who held the revolver during the holdup after the defendant and Smith returned to the establishment. This witness also stated that he identified the defendant when the defendant was returned to the tavern by the police after the shooting.

Steve Fedora identified defendant at trial as the holdup man holding the revolver in the tavern and ordering the patrons into the washroom prior to the shooting.

Chicago Police Officer Thomas Ingram testified that he was seated in his squad car with his partner, Donald Dixon, at the corner of 91st Street and Commercial Avenue (3000 East) at about 7:30 A.M. on May 21, 1965, when they received a radio dispatch of a holdup. Their vehicle was parked behind a police patrol wagon and both the wagon and the witness' vehicle were driven around the corner of 91st Street and Commercial Avenue and then easterly along 91st Street. Both vehicles then turned southerly on Houston Avenue, located one block east of Commercial Avenue.

Officer Ingram testified that he observed two men emerge from

an east-west alley situated 100 feet south of 91st Street. The men were on the east side of Houston Avenue and were dressed in coveralls. One of the men, later identified as Warren Smith, crossed Houston Avenue and proceeded westerly into the alley towards Commercial Avenue. Both police vehicles were driven a short way into the alley, facing in a westerly direction, and the officers in the police wagon alighted and fired a warning shot over Smith's head. Smith then fell to the pavement and threw away the shotgun which he was carrying.

Meanwhile, the second man had proceeded northerly along the east side of Houston Avenue to the corner of 91st Street, and Officers Ingram and Dixon gave chase. When the officers reached the corner, Officer Ingram observed the man enter a gangway of a building at 3048 East 91st Street. The officer testified that the man was carrying "something shiny" in his hand. Officer Ingram testified that Officer Dixon proceeded across 91st Street, northerly along Houston Avenue, to an east-west alley situated 100 feet north of 91st Street. At the same time, the witness followed the man through the gangway at 3048 East 91st Street. The officer testified that he went through the gangway and into the east-west alley, and then proceeded to the corner of a north-south alley, which forms a "T" with the east-west alley from the north, where he observed the man enter a gangway about "halfway up" the north-south alley. Officer Ingram testified that he proceeded into the north-south alley, entered a gangway at the rear of 9023 Houston Avenue, and proceeded through the gangway to Houston Avenue. He stated that he then observed Officer Dixon climb aboard a milk truck and rode the truck northerly along Houston Avenue toward 90th Street.

Officer Ingram testified that he then returned to his police

vehicle and proceeded to 90th Street, near Commercial Avenue, where Officer Dixon had defendant in custody. The officer testified that the defendant was clad in a red shirt and dark trousers. The officer further testified that he returned the defendant to the tavern but that no one in the tavern identified him as one of the holdup men. Officer Ingram also identified at trial, a pair of coveralls and a hat recovered in an areaway at 9021 Houston Avenue, as those worn by defendant during the chase.

Officer Donald Dixon substantially corroborated Officer Ingram's testimony concerning the events leading up to the chase of the defendant, until the point when defendant entered the gangway at 3048 East 91st Street and the officers went off in separate directions in pursuit. Officer Dixon stated that he proceeded northerly along Houston Avenue to the east-west alley 100 feet north of 91st Street, while Officer Ingram pursued defendant into the gangway. Officer Dixon testified that he entered the alley and proceeded to the point where it formed the "T" with the north-south alley. He stated that he was then signaled by Officer Ingram, who was already into the north-south alley, to return to Houston Avenue, which the officer did.

Officer Dixon testified that he proceeded several yards northerly along Houston Avenue when he observed defendant exit a gangway on the east side of Houston Avenue, to the north of the officer, clad in a red pullover sweater and dark trousers. The officer testified that he hailed a milk truck and rode the running board of the truck in pursuit of the defendant. The officer alighted from the truck as it turned the corner at 90th Street and Houston Avenue, traveling westerly towards Commercial Avenue, came upon the defendant, and placed him under arrest. Officer Ingram then arrived

with the police car and the officers and defendant returned to the tavern. He testified that when they arrived at the tavern, no one identified defendant as having been involved in the holdup.

There was further evidence adduced by the People that a handgun was found beneath the porch of a building located at 3048 East 91st Street, the yard which the defendant entered during the chase by the officers. The weapon was identified by several witnesses to the shooting as the handgun held by the defendant during the holdup.

The defendant and Warren Smith were placed in a line-up at police headquarters, after defendant put on coveralls found by the police upon a search of the premises at 9021 Houston Avenue. He was identified at the line-up by several of the eyewitnesses as one of the holdup men.

Defendant testified in his own behalf and stated that he lived at 69th Street and Peoria Avenue in Chicago at the time of his arrest, that he arose at 5:00 A.M. on May 21, 1965, and that he proceeded by public transportation and on foot to 90th Street and Commercial Avenue in search of employment. He testified that he was wearing a red shirt and black pants and was walking east on 90th Street, just east of Commercial Avenue, when he was placed under arrest by a police officer, searched and handcuffed. Defendant was then taken to a tavern about three blocks away where persons in the tavern were asked whether they could identify him as a holdup man. No one identified him. He testified that he was then taken to a police station, given coveralls and a hat to put on, and was placed in a line-up. He stated that he was then identified as one of the men who perpetrated the holdup at the tavern.

Defendant denied any participation in the holdup or the shooting, denied owning the coveralls and hat, and denied that he ever met Warren Smith prior to his arrest on May 21, 1965.

Defendant's contention that he was denied due process of law by being subjected to the allegedly prejudicial pretrial show-up and line-up, is without merit.

Initially it should be noted that defendant failed to complain of this alleged error at trial, nor did he make any objection to the in-court identifications made of him by the eyewitnesses. He cannot be heard to raise this matter as error on appeal after having proceeded through the entire trial without raising an objection thereto. See People v. Harris, 33 Ill.2d 389.

It is clear that the eyewitnesses who identified defendant at trial had adequate and sufficient time and opportunity to observe the defendant, both before and during the holdup, to serve as an independent basis for, and to support the in-court identification, apart from the observation of him at the show-up in the tavern and the line-up at police headquarters. Four eyewitnesses positively identified defendant at trial as the man holding the pistol during the holdup. Schlegman saw defendant and Smith on the street prior to 7:00 A.M. and again in the tavern prior to and during the holdup. Gordon spoke to the defendant near the juke box, and Simmons spoke to him near the pool table. It is clear that the eyewitnesses had ample time and opportunity prior to and during the holdup to observe the defendant, which serves as an independent source of identification supporting their in-court identifications of him. People v. Lee, 44 Ill.2d 161, 170.

Defendant also contends that the trial court erred in denying his motion for a severance. We disagree.

Generally, persons jointly indicted are to be jointly tried. People v. Earl, 34 Ill.2d 11, 13. The question to be resolved is whether the defenses of the accused are so antagonistic that a

fair trial can be assured only by a severance. People v. Bernette, 45 Ill.2d 227, 240-241. The determination of that question rests within the sound discretion of the trial court. People v. Yonder, 44 Ill.2d 376, 385-386.

In the instant case the defenses of the defendant and of Warren Smith were not antagonistic. Both men denied participation in the holdup, and each denied knowing the other prior to their respective arrests. Further, during the hearing on the motion for the severance, it was stipulated that a statement made by Warren Smith at the time of his arrest, to the effect that he did not want the officers to shoot him and that he was "going to the electric chair anyway," would not be used at the trial against the defendant. The trial court did not abuse its discretion in denying defendant's motion for a severance.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

4 I.A.3 1008

51350

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
v.	CIRCUIT COURT,
WARREN SMITH (IMPLEADED), Defendant-Appellant.	COOK COUNTY.
	HON. EDWARD E. PLUSDRAK, Presiding.

ABST. CHICAGO BAR ASSOCIATION

MR. JUSTICE BURKE delivered the opinion of the court.

Warren Smith (hereinafter "defendant") and Dennie Maddox were found guilty at a jury trial of the crime of murder which arose out of an armed robbery occurring in May 1965; each was sentenced to a term of one hundred years to one hundred ninety-nine years in the penitentiary. Defendant has prosecuted this appeal from that judgment. (Dennie Maddox is not involved in this appeal. See People v. Maddox, ____Ill.App.3d___(1st Dist.,Gen. No. 51349, April 10, 1972.))

Mr. Ellis B. Rosenzweig, who was appointed as defendant's counsel on this appeal, has filed in this Court a motion for leave to withdraw as appellate counsel on the ground that he is "unable to detect any error which would constitute a basis for a reversal in this cause." Pursuant to the requirements set out in the case of Anders v. California, 386 U.S. 738, appellate counsel has also filed a memorandum in support of that motion raising several issues which, after a review of the entire record, he believed might conceivably serve as a basis of an appeal. Both the motion and the attendant memorandum reflect that defendant was served with a copy of each document through appellate counsel's office.

This Court thereafter notified the defendant of the pending motion and the memorandum, and granted him leave to file points in support of the appeal. Defendant has not responded.

Examination of the entire record on this appeal by this Court, as required by the Anders decision, discloses no arguable points other than those raised by appellate counsel, which are as follows:

I. At a preliminary hearing the trial court ruled that certain

oral inculpatory statements made by defendant, while he was in police custody and made during several police interrogations, were voluntary and admissible as evidence. Defendant was not advised beforehand of his right to counsel, his right to remain silent, or the like. Trial of this matter pre-dated the decision of the United States Supreme Court in the case of Miranda v. Arizona, 384 U.S. 436 requiring that an accused be advised of such rights, and for that reason the requirements set out in the Miranda case are not applicable to the case at bar. See Johnson v. New Jersey, 384 U.S. 719. Further, only one of those statements, a spontaneous utterance made by defendant at the time of his arrest, was introduced at trial, thereby obviating any meritorious ground for appeal in that regard. See People v. Lowe, 122 Ill.App.2d 197, 205.

II. Defendant, who had remained in police custody from the time of his arrest, was not tried within 120 days from the date of the arrest. That delay however was occasioned in part by a motion made on defendant's behalf within 120 days from the date of the arrest. Defendant was in fact tried within the 120-day term following that motion.

III. A review of the opening and closing statements of the prosecuting attorney reveals that no improperly prejudicial or inflammatory remarks were made. The People's plea was based upon the evidence adduced attrial, and it further concerned the sanctity of human life. It further appears that defendant's counsel at trial was permitted considerable latitude in his opening and closing remarks to the jury.

IV. The decedent's widow was permitted to testify for the People that she saw her husband alive when he left home on the evening before the homicide allegedly occurred, and that the next time

she saw him he was dead. There was no evidence elicited from the witness dealing with the deceased's family, family life, or the like, nor any other matters which may be considered to have been prejudicial to the defendant.

V. A photograph of the deceased's remains, which was taken after the remains had been removed to a hospital, was shown to several of the People's witnesses for the purpose of identification of the remains as that of the deceased. The photograph was not permitted into evidence, and the trial court expressly stated that it was not viewed by the jury.

VI. The prospective jurors were qualified for the death penalty, each of them being asked the question whether they had any moral, conscientious or religious scruples against imposing the death penalty in a proper case. Those admitting to such scruples were challenged for cause. Although the People requested the jury to impose the death penalty, the death penalty was in fact not imposed upon the defendant, thereby obviating any possible violation of the proscriptions in that regard set out in the decision of Witherspoon v. Illinois, 391 U.S. 510. See Bumper v. North Carolina, 391 U.S. 543.

Finally, several instructions submitted by the People and objected to by the defendant, were properly given to the jury. They related to such matters as non-disqualification of a witness for reason of a criminal record; responsibility for the acts of a co-felon; prejudice and sympathy having no place in the jury's decision; the finding of defendant's guilt beyond a reasonable doubt; and flight from the scene after the commission of a crime. See People v. Cassin, 322 Ill. 276, 278; People v. Robbins, 88 Ill.App.2d 447, 456; People v. King, 29 Ill.2d 150, 154; People v. Weaver 18 Ill.2d

108, 115; and People v. Agnello, 22 Ill.2d 352, 362.

From all the circumstances disclosed by the instant record we conclude that the appeal is frivolous and without merit. Accordingly, Mr. Ellis B. Rosenzweig is granted leave to withdraw as appellate counsel, and the judgment is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

4 I.A.3 1009

55220

MATTIE HEARD, Plaintiff-Appellant, vs. CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE EDWARD R. FINNEGAN, PRESIDING.

ABST.

CHICAGO BAR ASSOCIATION

MEMORANDUM OPINION PER SUPREME COURT RULE 23.

MR. JUSTICE LYONS delivered the opinion of the court:

Plaintiff, Mattie Heard, brought suit against the City of Chicago and the Chicago Transit Authority for personal injuries allegedly sustained when the wheel of a bus in which she was riding as a passenger went into a hole in the street. The jury returned a verdict of $1,155.00 in favor of plaintiff and against the City of Chicago. No liability was assessed against the Chicago Transit Authority by the jury and this appeal by plaintiff is taken only from the judgment against the City of Chicago.

Plaintiff presents two issues for consideration by this court: (1) Whether the amount awarded to plaintiff was inadequate and against the manifest weight of the evidence, and (2) Whether certain evidentiary rulings by the trial court were prejudicial on the question of damages.

In connection with plaintiff's first contention, i.e., that the amount of the jury award was inadequate, we have carefully reviewed the record and are satisfied that ample support for the jury's decision may be found in the evidence adduced at trial. Serious conflicts both as to the extent of plaintiff's injuries and the relationship of those injuries to the occurrence in question are readily apparent in the record. Under such circumstances, we believe that the principle set forth in Zielinski v. Goldblatt Bros., Inc., 1969, 110 Ill. App. 2d 248, 253, is

controlling here and we adopt the following language of that decision:

> In summary, the evidence relating to special damages, pain, suffering and permanency of injury, is susceptible of widely varying inferences. Haleem v. Onate, 71 Ill.App.2d 457, 219 N.E. 2d 94. Such evidence viewed most favorably to plaintiff, would have supported a substantially larger verdict. Viewed most favorably to the defendant such evidence amply supports the verdict of the jury and accordingly such verdict is not demonstrably inadequate.

Likewise, we have reviewed the evidentiary rulings about which plaintiff complains and are satisfied that the trial court neither manifestly abused its discretion nor otherwise substantially prejudiced plaintiff. See Piechalak v. Liberty Trucking Co., 1965, 58 Ill. App. 2d 289.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.

4 I.A.3 1082

CHICAGO BAR ASSOCIATION

56591

ABST.

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY.
	)	
ISAAC C. CURRY,	)	Hon. Richard J. Fitzgerald,
	)	Presiding.
Defendant-Appellant.	)	

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was indicted for murder, armed robbery, burglary and grand theft, and at arraignment entered a plea of not guilty. When the case came on for trial, defendant, represented by private counsel, withdrew his plea of not guilty and pleaded guilty. The evidence was stipulated, and defendant was sentenced to 14 to 30 years for murder, 6 to 12 years for armed robbery, and 6 to 12 years for burglary, all sentences to run concurrently.

Subsequently defendant filed his notice of appeal, and the public defender was appointed to represent him on appeal. The public defender now seeks to withdraw. He has filed a brief in support of his motion pursuant to the case of Anders v. California, 386 U.S. 738, and states that from a review of the record the only basis for appeal would be whether the trial court fully admonished the defendant as to the significance and consequences of his plea of guilty. The public defender concludes that the trial court properly admonished defendant, and that an appeal would be without merit.

Defendant received a copy of the public defender's motion and memorandum. He was also sent a letter by this court notifying him of the motion and giving him an opportunity to file any points he might choose to support his appeal. No response has been received from him.

After a complete examination of the record, we have concluded that the public defender is correct and that there is no merit to this appeal. The trial court properly admonished defendant of the significance and consequences of his pleas of guilty, adhering fully to the requirements of Supreme Court Rule 402. When defendant persisted in his pleas, they were

The motion of the public defender to withdraw as counsel for defendant is allowed and the judgment is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

CHICAGO BAR ASSOCIATION

56546

I.A.3 1083

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
WILLIAM E. PRESNELL (Impleaded),
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Herbert R. Friedlund, Presiding.

ABST.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

We have before us in this appeal the conviction of William Presnell, defendant, upon two charges of armed robbery. He originally pleaded not guilty then changed the plea to guilty and was accordingly sentenced to two concurrent terms in the penitentiary from ten years to ten years and one day. More than 30 days after entry of judgment, defendant filed a pro se petition seeking to vacate these convictions or to reduce the sentences. The trial court denied the motion without a hearing because of the passage of time. The matter was docketed in the Supreme Court of Illinois and leave was granted to prosecute the appeal. Counsel was appointed for defendant and the necessary briefs and excerpts were filed. The Supreme Court then transferred the appeal to this court for disposition.

The first aspect of the petition concerns the allegation that defendant was impelled to plead guilty because of "veiled threats" of receiving a sentence from 40 to 60 years in the penitentiary. The record shows that defendant persisted in his plea of guilty after conference and consultation with his lawyer and despite admonition by the court. In open court and in the presence of the defendant, stipulations of fact were entered into which showed that there was a factual basis for

the plea of guilty. See Rule 402(c) of Illinois Supreme Court as amended effective September 1, 1970. Under these circumstances, the mere assertion of the presence of "veiled threats" is patently insufficient as a reason for subsequent withdrawal of the plea of guilty. People v. Scott, 49 Ill. 2d 231, 233, 274 N.E.2d 39.

The petition also alleges that to the knowledge of defendant four persons with far worse criminal records were sentenced on the same date and received more lenient sentences than defendant. "It is well established that a defendant cannot complain that his sentence was excessive compared with the sentences of his co-defendants when the sentence was within the statutory limits for the offense and the trial court could have considered other relevant factors concerning defendant's conduct." People v. Spears, 50 Ill.2d 14, 18, 276 N.E.2d 322. See also People v. Cox, 119 Ill.App.2d 163, 167, 255 N.E.2d 208. A fortiori, defendant cannot attack his own sentence by attempted comparison with sentences passed upon persons unknown. No relief may be granted upon this type of allegation.

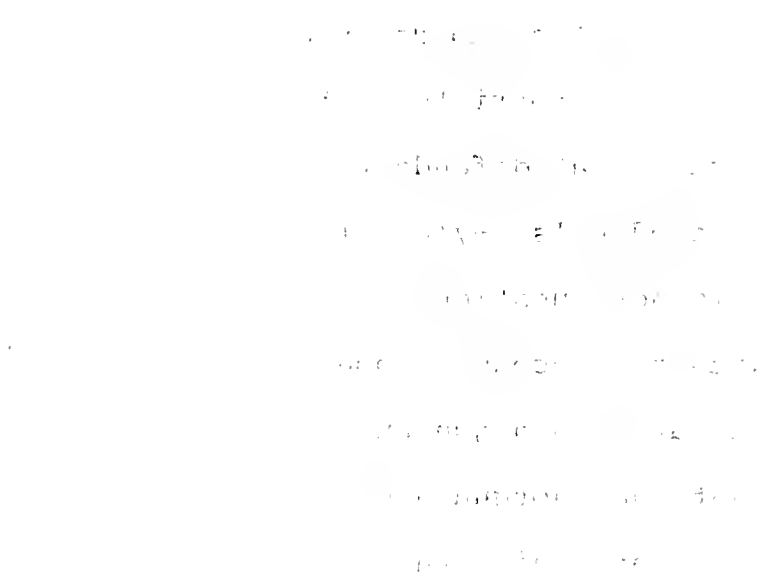
The remaining allegations of the petition raise a question regarding the lack of a spread between the minimum and maximum terms. The mandate of the statute is clear that "all sentences to the penitentiary shall be for an indeterminate term." Ill. Rev.Stat. 1969, ch.38, par.1-7(e). This court has often applied the general guiding principle that a minimum sentence should not exceed one-third of the maximum. See Abernathy, Sr. v. People, 123 Ill.App.2d 263, 273, 259 N.E.2d 363; People v. Lobb, 1 Ill. App.3d 239, 243, 244, 273 N.E.2d 206. We are aware that the three to one ratio is not a hard and fast rule but is subject to modification, dependent upon all of the circumstances in the

case. Note the well reasoned opinion and the equally potent dissent in People v. Lampley, 1 Ill.App.3d 282, 274 N.E.2d 171.

Upon examination of all of the circumstances divulged to us by this record, and upon complete consideration, we conclude that the minimum sentences should be reduced to five years. Accordingly the judgments of conviction entered upon defendant's pleas of guilty are both affirmed. The sentences are reduced from terms of from ten years to ten years and one day to minimum sentences of five years and maximum sentences of ten years, to run concurrently; and, as thus modified, the judgments are affirmed.

Judgments affirmed as modified.

BURKE, J. and LYONS, J. concur.



CHICAGO BAR ASSOCIATION

4 I.A.3 1092

56845

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
MELVYN ALLEN,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Hon. Francis T. Delaney, Presiding.

ARST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was indicted for the murder of his common-law wife. After a bench trial, he was convicted of that crime and sentenced to a term of 15 to 25 years. On appeal, defendant's sole contention is that he was not proved guilty beyond a reasonable doubt. Supreme Court Rule 23(c), effective January 31, 1972, permits this court to affirm the judgment of the trial court in such cases by means of a memorandum opinion if it is determined that no error of law appears, that an opinion would have no precedential value, and that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. We believe that such a disposition is appropriate in the instant case.

It is undisputed that defendant fired the shot that killed the decedent. Decedent's 8-year-old daughter, whose competency to testify is not questioned, testified that, after having a discussion with the deceased about money, defendant went into the bedroom, came out with a gun and shot her mother. Defendant testified that the shotgun accidentally went off, killing decedent. Defendant denied that he quarrelled with the deceased about money or that he took money after the shooting. Defendant fled the scene, and was apprehended by the police 17 days later.

The credibility of the witnesses was a matter for the determination of the trier of fact, with his superior opportunity not only to hear the witness' testimony but to observe their demeanor on the stand, and his judgment will not be disturbed upon review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. See

People v. Jackson, 28 Ill.2d 566, 192 N.E.2d 873; People v. Mack, 25 Ill.2d 416, 185 N.E.2d 154.

In the instant case, a careful examination of the record reveals that no error of law appears, and that the evidence was not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

4 I.A.3 1096

No. 54773

LAWRENCE ALLISON, Plaintiff-Appellant, vs. VERNON BEECHY, JR. and VERNON BEECHY, SR., Defendants, vs. STATE SECURITY INSURANCE COMPANY, Garnishee-Defendant-Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE RONALD J. CRANE, Presiding.

CHICAGO BAR ASSOCIATION
ABST.

MR. JUSTICE LEIGHTON delivered the opinion of the court.

This was a garnishment proceeding. Appellant Lawrence Allison had a judgment against Vernon Beechy, Jr. for personal injuries arising out of an automobile accident. Beechy, Jr. is the 17-year-old son of the senior Vernon Beechy whose automobile was insured by State Security Insurance Company, the garnishee-appellee. The policy contained a special endorsement which excluded coverage when the insured automobile is driven by a male under the age of 25. Plaintiff was injured by Beechy, Sr.'s automobile while it was being driven by 17-year-old Beechy, Jr. At the conclusion of the plaintiff's case, the trial judge found in favor of the garnishee insurance company. In this appeal, the only question is whether a special endorsement excluding from coverage male drivers under the age of 25 is valid.

This question was answered in Meyer v. Aetna Casualty Insurance Co., 46 Ill. App. 2d 184, 196 N. E. 2d 707. The

appellate court for the fifth district held that an exclusion endorsement like the one in this case is valid. Meyer is recognized in federal courts as the law of Illinois. See Shaw v. Aetna Casualty and Surety Company, 284 F. Supp. 676 (N.D. Ill. E.D. 1968). When Meyer is distinguished by other reviewing courts of this state, it is not questioned as the expression of Illinois law. See Wilson v. Resolute Insurance Company, ____Ill. App. 2d_____, 267 N. E. 2d 720. Nor has the soundness of Meyer been doubted when it is cited as authority for the doctrine it principally represents. See Kenilworth Insurance Company v. Chamberlain, ____Ill. App. 2d ____, 269 N. E. 2d 317. This being the case, the trial judge ruled correctly when he made a direct finding in favor of defendant-appellee at the close of plaintiff's case. The judgment is affirmed.

AFFIRMED.

STAMOS, P.J., and SCHWARTZ, J., concur.

Publish Abstract Only.

RESERVE BOOK

Ill. Appellate 3rd Series

Unpublished Opinions

Vol. 3-4

~~XXXXXXX~~ 107674

This reserve book is NOT transferable and must NOT be taken from the library ~~except when charged out for overnight use~~.

You are responsible for the return of this book.

DATE	NAME		
12-5-79	Brodie	726	0440
2-5-80	McGraf	876	7964
4-18-80	Paulini	236	9700
[illegible]	[illegible]		
7-28-80	Rothman Thrush	324	5151
8-1-80	P. Van Ness	782	6636
8-21-80	D.J. HANEY	855	5390
8/28		726	2468
9/4-80	Neil ELListon 435	346	7400
2/7-81	FRANK DiLORETO	326	5251
7/20/81	V. Graeman	46387	

ILLINOIS APPELLATE - 3rd Ser
UNPUBLISHED OPINIONS
Vols. 3-4
107674

AUG 73
N. MANCHESTER, INDIANA